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Supreme Court, U.S.
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No. 10-

In The

Supreme Court of the United States

VANESSA HALDEMAN; BENJAMIN HALDEMAN,
BY THEIR PARENTS *AS NEXT FRIENDS*;
JOSEPH HALDEMAN; DENISE HALDEMAN,
Petitioners

v.

KAREN DUTY; DONALD CUPP,
Respondents

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The district court denied in part social workers' motions for summary judgment with respect to their claims of official immunity from lawsuit for, inter alia, wrongful removal of the minor plaintiffs from family home, improperly subjecting four-year old female plaintiff to intrusive vaginal examination, conspiring to produce false evidence of the children's sexual abuse by their parents, and placement of the children in abusive foster care.

1. Whether the appellate court may review de novo the district court's factual determinations underlying partial grant and partial denial of the defendant's motion for summary judgment with respect to the defense of official immunity upon the defendant's interlocutory appeal of denial of official immunity.

2. Whether the Ninth Circuit Court of Appeals exceeded the bounds of its authority and disregarded this Court's decisions in Behrens v. Pelletier, 516 U.S. 299, 116 S.Ct. 834 (1996) and Johnson v. Jones, 515 U.S. 304, 115 S.Ct. 2151 (1995), its own precedent, and the decisions of other United States courts of appeal, when it reversed the district court's decision to deny in part the defendant's motion for summary judgment by finding that plaintiffs failed to produce any evidence to support their claims even though the district court found ample evidence of the alleged conduct.

3. Whether the court below misconstrued the law applicable to official immunity in connection with investigation of child sexual abuse set forth in Devereaux v. Abbey, 263 F.3d 1070 (9th Cir. 2001); Wallis v. Spencer, 202 F.3d 1126 (9th Cir. 2000); and Beltran v. Santa Clara County, 514 F.3d 906 (9th Cir. 2008).

LIST OF ALL PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

Plaintiffs-Appellees: Vanessa Haldeman; Benjamin Haldeman; Joseph Haldeman; Denise Haldeman; Jerry Haldeman; Carol Haldeman,

Defendants-Appellants: Karen Duty; Donald Cupp,

Defendants-Appellees: Ruth Golden; Patricia Navarro; Caroline Hayashi; Cynthia Noel; University of the Nations Pre-School; University of the Nations; Alexander Graves; Jill Acero; Colleen Clark; Bobbette Strauss; Andrea McCollum; David Kaulia; Child Protective Services, an agency of the Department of Human Services, State of Hawaii; Department of Human Services, State of Hawaii; County of Hawaii; Child and Family Service; Institute for Family Enrichment; Legal Aid Society of Hawaii.

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Supreme Court Rule 13 1

Vanessa Haldeman and Benjamin Haldeman, by their parents as next friends, Joseph Haldeman and Denise Haldeman, respectfully petition for a writ of certiorari to review the judgment of the Untied States Court of Appeals for the Ninth Circuit.

DECISION BELOW

The decision of the court of appeals is not officially reported but is available at 2009 WL 4912614 and is reproduced in Appendix A at 1a-6a. The relevant decisions of the United States District Court for the District of Hawaii are not officially reported but are available at 2008 WL 515950 and 2008 WL 1732966, and are reproduced in Appendix B at 7a-49a and Appendix C at 50a-85a, respectively.

JURISDICTION

The Memorandum of the court of appeals containing its judgment was issued on November 23, 2009. Petitioner's petition for panel rehearing and/or rehearing en banc was denied on February 20, 2010. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This Petition is timely under 28 U.S.C. § 2101(c) and the Rules of the Supreme Court of the United States Rule 13.1 and 13.3 because it is being filed within 90 days after the entry of the denial of the petition for rehearing.

STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1983 of Title 42 of the United States Code provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

> deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

STATEMENT OF THE CASE

The court below, summarily and without meaningful explanation, reversed the district court's carefully reasoned decisions granting in part and denying in part social workers' motions for summary judgment with respect to their official immunity defenses. The court of appeals inexplicably directed the district court to dismiss all claims against the social workers. In doing do the court below exceeded the bounds of its authority and disregarded this Court's controlling precedent in Behrens v. Pelletier, 516 U.S. 299, 116 S.Ct. 834 (1996) and Johnson v. Jones, 515 U.S. 304, 115 S.Ct. 2151 (1995), which limits the scope of interlocutory appellate review of denial of official immunity to purely legal issues of law relating to qualified immunity – typically, the issue of whether the federal right allegedly infringed was "clearly established." Instead of addressing any purely legal issues, the court of appeals conducted a de novo review of the district court's decisions dealing with complex, factually intensive issues. Without explaining its reasoning in the short Memorandum it issued, the court of appeals reviewed not only the factual issues underpinning the district court's partial denial of official immunity, but apparently also the issues pertaining to the

partial grant of the immunity, which were not on appeal. The court of appeals' terse and overbroad directive to dismiss all claims prompted the district court to prematurely enter a final judgment in favor of the social workers and against all Plaintiffs, in spite of the pendency of Plaintiffs' claims against other parties.

The appellate court's summary disposition of this case, without specifically addressing the multiple issues discussed in the district court's opinions and argued by the parties on appeal, violates the basic principles upon which our appellate review system is premised, and ultimately undermines the public's confidence in the system. This case raises issues of national importance regarding the delicate balance between the need to protect those children who are abused and exploited in their homes and the fundamental right of the children and their families to be free from unwarranted intrusions by overzealous and/or misguided state social workers who mistakenly and unlawfully remove children from their families. Such intrusions can be as devastating to the children and their families as the sexual and other abuse that they are intended to prevent. This case graphically illustrates the point.

The broad discretion given to the social workers of the child protective services by the statutory scheme and the practice in Hawaii, as well as in other jurisdictions, can be easily abused and such abuses are not easily remedied. In fact, the record in this case suggests that it is virtually impossible for a family to effectively challenge the decision of the Hawaii's Child Protective Service (CPS), an agency

within the Hawaii Department of Human Services (DHS), to remove a child from the family home upon allegations of the family's abuse. According to the testimony of Robert Kim, Esq., an experienced and respected family law practitioner in the Kona district of Hawaii where this case originated, who represented Plaintiffs-Petitioners herein in the family court, he was not aware of any case where a family would be able to prevail against the DHS. ER (Excerpts of Record) 754. The family court judge invariably rubber-stamped the DHS's decisions based upon the testimony of supposed "experts" in the DHS's employ. In a typical case, the family does not have the resources to fight, and even if it does, its ability to fight is quickly exhausted.

In this case, Plaintiffs-Petitioners have retained nationally recognized experts and after one year of court fight costing hundreds of thousands of dollars were able to cause the children to be transferred to the state of Washington, where the children's grandparents, Plaintiffs Jerry Haldeman and Carol Haldeman reside. The Washington family court ultimately reunited the children with their parents after additional two years of proceedings and despite the Hawaii DHS's persistent efforts to prevent the reunification. The criminal charges of sexual abuse brought by the Hawaii authorities against the children's father, Plaintiff Joseph Haldeman, were dismissed in a jury trial for insufficient evidence. Championing the cause of many families who were similarly abused by the DHS/CPS, Plaintiffs brought the present lawsuit in the federal district court for violations of their federal constitutional rights under

28 U.S.C. § 1983 and related common law claims under the state law against the social workers and several other state actors and their agents. The district court recognized the salient issues underlying this lawsuit and denied the key defendants' summary judgment motions finding that multiple factual issues required a determination by a jury with respect to Plaintiffs' main claims. The court of appeals inexplicably ordered dismissal of all claims against the social workers upon their interlocutory appeals of denial of official immunity, the review of which should have been limited to determination of purely legal questions. In doing so, the court below has so far departed from the accepted and usual course of proceeding as to call for an exercise of this Court's supervisory power.

FACTUAL BACKGROUND[1]

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[1] This case arises from two closely related, but never formally consolidated, appeals to the United States Court of Appeals for the Ninth Circuit, Appeal Nos. 09-15648 and 09-16352 in which Defendants-Respondents Karen Duty and Donald Cupp appealed the district court's orders partially denying their respective motions for summary judgment. Appendix (App.) at 7a-49a and 50a-85a. The court of appeals disposed of both appeals in one Memorandum, filed on November 23, 2009. App. at 1a-6a. In accordance with the Rules of the Ninth Circuit Court of Appeals, the record on appeal consisted of the Excerpts of Record (ER) filed by the parties. In the Factual Background presented herein, the citations to the record pursuant to the Supreme Court Rule 12.7 are to the ER filed by Plaintiffs-Petitioners. The documents comprising the ER are identified by a docket number under which the document was filed in the district court, followed by page number if appropriate.

Hawaii DHS's serious and systemic problems in investigating child sexual abuse allegations led to nine months of the Hawaii Legislature's hearings into DHS abuses in 2003. ER 802-3, 802-4, 802-5 and 802-6. These hearings brought out harrowing stories of the violations of Hawaii citizens' federal Constitutional rights by the CPS in the years 2001 - 2003 and prompted the Hawaii Legislature's Resolution "that the Hawaii Civil Rights Commission is requested to investigate the following ***repeated violations of state and federal laws and regulations by CPS.***" (Emphasis added.) ER 802-7 at 3.

In the summer and fall of 2002, Vanessa Haldeman, then four years old, attended the University of the Nations Preschool in Kona, Hawaii. ER 817 at 4. During that time, she exhibited sexualized behavior, such as showing the genital areas of her body and inviting other children to do the same. ER 802-9 at 4-6, 802-10 at 11 and 802-11 at 10. This behavior was normal for a preschool child. Id. Indeed, other children in Vanessa's class had exhibited similar behavior. ER 802-30 at 92-94. However, Vanessa never demonstrated any sexualized behavior at other daycare programs that she attended during the same time period. ER 802-1 5 at 297-299, 802- 17 at 115-120. Each time Vanessa acted out with sexualized behavior at the University of Nations Preschool, the school personnel responded to Vanessa's behavior by taking her to the school office, praying with her, and giving her enjoyable activities and treats – all of which reinforced Vanessa's behavior so that it became a daily occurrence. ER 802-11 at 5-6 & 14. The preschool

never informed the parents, Joseph and Denise Haldeman, of their daughter's behavior. ER 802-22, 802-1 5 at 292-299, 802-17 at 115-1 16, 802-10 at 12-14.

On July 17, 2002, Ruth Golden, as the Director of the University of Nations Preschool, contacted the DHS/CPS by telephone and informed them of Vanessa's sexual acting out behavior at the preschool. ER 802-23, 802-24 at 80, 802-25 at 66 & 106, 802-26 at 32-33, 802-27 and 802-28. No one from the CPS came to the school to investigate or made contact with the Haldeman family. ER 802-28.

Approximately three months later, on October 23, 2002, during the naptime, Vanessa Haldeman made a statement to her teacher Caroline Hayashi that suggested sexual activity with her father, which prompted Ruth Golden to report the incident to the CPS. ER 817 at 5. By this time, the CPS had had three referrals from the preschool concerning Vanessa Haldeman, but the parent still had not been informed. ER 802-9 at 6.

The following day, October 24, 2002, the CPS social worker Karen Duty and police officer Detective Alexander Graves arrived at the pre-school and briefly talked to Caroline Hayashi and Ruth Golden. ER 802-29 at 39-40, 802-34 at 53-55. However, as Duty later testified, she had made a decision to seize Vanessa and her brother Benjamin Haldeman before she had even talked to any of the teachers at the preschool. ER 802-35 at 7-8. At the preschool, Hayashi told Duty and Detective Graves that Vanessa's sexual behavior had been going on since "last summer." ER 802-36 at 1.

Neither Duty nor Detective Graves made contemporaneous notes nor taped their interviews of Golden and Hayashi. ER 817 at 6, 802-11 at 16 and 802-37 at 4 & 9. Director Golden gave Duty and Detective Graves copies of notes that Golden had written concerning Vanessa's sexual behavior at the preschool. ER 802-36 at 2. These notes revealed the names of at least eight people who had allegedly witnessed Vanessa acting out in a sexualized manner. Neither Duty nor Detective Graves talked to any of these eye-witnesses. ER 802-36 at 2-4, 802-29 at 49-52 and 802-37 at 4. Neither Duty nor Detective Graves asked the preschool personnel basic questions, such as: (a) How often do Vanessa's behaviors occur? (b) What do preschool personnel do when these behaviors occur? (c) Do Vanessa's sexual behaviors happen anywhere else? (d) How did the parents respond when informed of Vanessa's sexual behaviors? ER 802-9 at 12, 802-11 at 16 and 802-37 at 11-12. Neither Duty nor Graves made any attempt to discover that the preschool teachers had encouraged, reinforced and shaped Vanessa's sexualized behavior. ER 802-38 at 27-28, 802-34 at 60-63, 802-29 at 47-48 & 55-56 and 802-37 at 12-13.

Duty talked to Vanessa at the preschool. ER 802-35 at 8, 802-29 at 56 and 802-39. No notes were made of this exchange. ER 817 at 6. After less than 40 minutes at the preschool, and without obtaining a warrant or any judicial order, social worker Duty and Detective Graves seized Vanessa Haldeman and removed her from her preschool. ER 802-9 at 37, 802-11 at 16 & 73, 802-34 at 63-64, 802-37 at 5 & 14 and 802-40. Meanwhile, on Karen Duty's

instructions, another CPS social worker, Donald Cupp, accompanied by a police officer removed Benjamin Haldeman, Vanessa's eight years old brother, from his school as well. ER 802-41 at 35-37. The social workers and Detective Graves took the children to the Children's Justice Center (CJC) for interviews. ER 817 at 6-7.

During the drive to the CJC, Duty talked to Vanessa about "suck," "private parts," and "secrets." ER 802-39. Upon arrival at the CJC, Duty again talked to Vanessa before the interview. ER 802-20 at 53-55 & 140-141, 802-21 at 279-280, 802-29 at 61 & 65-66, 802-34 at 64 and 802-37 at 5 & 14. No notes were made of these exchanges. Id. At the CJC, Vanessa was shown the facilities including the video room behind the two-way mirror – the room from which Vanessa was told that Cupp and Detective Graves would be watching her. ER 802-29 at 64, 802-34 at 65, 802-35 at 11 and 802-42 at 11-14.

Then Duty began her "forensic" interview of Vanessa. During the interview – which was videotaped – Vanessa told Duty many kid fantasy "facts." ER 8 17 at 7-8, 802-43, 802-9 at 15-2 1 and 802-1 1 at 17-32. Duty fed ideas to Vanessa that were *different* from Vanessa's ideas and *introduced* numerous concepts to Vanessa which did not originate in Vanessa. ER 802-9 at 15-2 1 and 802- 11 at 17-32. A turning point in the interview occurred when Duty placed an ear-bud in Vanessa's ear and there was an off-the-record conversation between Detective Graves, who was observing the interview with Cupp through the two-way mirror, and Vanessa. ER 802-2 1 at 21 1-2 13, 802-29 at 68-69,

802-35 at 22 & 35 and 802-39. Detective Graves talked to Vanessa about "private parts" and "private touching." Id. No note was made of this conversation nor was the conversation recorded in any way, shape or form. Id. and ER 817 at 9. ***Immediately after*** this off-the-record conversation between Detective Graves and four-year-old Vanessa, Duty asked:

> "*Q. So what'd **he** tell you?*"

Vanessa replied:

> "***A.** Um, He, He kinda, um, kinda, touched my private part into his um, um, private part?*"

ER 802-43 at 39-40.

At three separate times during the interview, Vanessa told Duty that she was tired and wanted to be "done real fast." ER 802-43 at 38, 52 & 59. However, Duty did not stop the interview. ER 802-39, 802-35 at 31-34 and 802-34 at 173. Duty's conduct in the interview process was so suggestive, coercive and abusive that she knew or should have known that it would yield false information that in turn would subject the Haldeman family to criminal prosecution. ER 802-9 at 13, 21 & 37, 802- 11 at 9, 12 & 17-32 and 802-37 at 5 & 15-16. As one of the Plaintiffs' experts testified: "*[Duty] used every technique research documents to be coercive and suggestive in her interview.*" ER 802-9 at 26.

Following Vanessa's interview, Detective Graves conducted an interview of Benjamin Haldeman. ER 802-29 at 71-72, 802-33 at 325-327, 802-34 at 29, 38, 40 & 45 and 802-45 at 5. Duty and Cupp observed

and participated in the interview from the video room. Id. During the interview, Graves referred to and talked to Duty through a microphone five separate times. Id. Benjamin's interview unequivocally refuted any hint of inappropriate sexual behavior in the Haldeman family – *in spite of* Graves' persistent efforts to elicit statements relating to sexual activities. ER 802-44, 802-9 at 21-25, 802-11 at 33-39, 802-37 at 5 & 16-17 and 802-32 at 230-231. Following Graves' interview of Benjamin, no reasonable investigator could have believed that the children were in danger nor would such an investigator have continued the seizure. ER 802-9 at 25-26.

After the interviews of the Haldeman children, Duty and Graves decided to continue to detain the children. They decided to subject Vanessa to an intrusive vaginal colposcopic exam without parental consent or court order. ER 802-46, 802-47 and 802-30 at 80. The examination did not reveal any sign of sexual abuse – "no genital injuries noted." Vanessa's hymen was found intact. ER 802-47, 802-10 at 7 and 802-37 at 5. Even though the DHS's guidelines required Duty to talk to Denise Haldeman, no one called Denise Haldeman about what Duty, Graves and Cupp had done with the Haldeman children. ER 802-34 at 52-53. After the colposcopic exam, Duty and Cupp placed Vanessa and Benjamin in DHS's foster care. ER 802-48 at 6-7. Donald Cupp made a "finding" that "*sexual abuse of Vanessa Haldeman by her father, Joseph Haldeman was confirmed.*" ER 802-41 at 213-215. Karen Duty "approved" and

"supported" this "finding." ER 802-- 48 at 4 & 6 and 802-34 at 182-184.

The day after the Haldeman children were seized, on October 25, 2002, Joseph and Denise Haldeman met with Donald Cupp. ER 817 at 13-14. Cupp told the Haldemans that Vanessa had "disclosed" and the DHS had "confirmed" sexual abuse by Joseph and that Denise had failed to protect her. ER 802-15 at 235-236, 240 & 246. The Haldemans confronted Cupp stating that the DHS was "trying to build a [false] case" against them and that they would definitely sue Cupp, DHS, the preschool and all others involved in this process. ER 802-17 at 99-101 & 133, 817 at 14.

Cognizant of the Haldemans' threat to file a lawsuit, Duty and Cupp prepared and filed under oath a Petition to the family court for temporary custody of the children. ER 817 at 14-15. The Petition, dated October 29, 2002, and a subsequent "Safe Family Home Report," submitted to the family court, contained outright misrepresentations of the facts, material omissions, and direct falsification of the statements made by Vanessa and Benjamin during their interviews at the CJC. ER 817 at 14-16, 802-9 at 27 & 30, 802-1 1 at 41-45 and 802-37 at 20-22. Building upon the Petition and the Safe Family Home Report, Duty and Cupp prepared and signed a "Family Service Plan," dated October 30, 2002, designed to coerce the Haldemans to admitting the false allegations of sexual abuse of their daughter Vanessa. ER 817 at 14-16, 802-50. Shortly after the commencement of the family court proceeding, Duty and Cupp began attending regular "case conference"

meetings concerning the Haldeman case with several representatives and agents of the DHS, the police department, and the prosecutor's office, and other state actors. ER 807-4, 817 at 16-17. They continued to attend these meetings until June of 2005. ER 807-6, 807-9 and 802-63.

In November 2002, Joseph Haldeman underwent a polygraph lie detector test during which he was questioned regarding the allegations of sexual abuse of his daughter Vanessa. ER 817 at 16. Joseph denied all of the allegations and the polygraph examiner found him to be truthful. Id. Nevertheless, Defendant Andrea McCollum, acting for the state as the children's guardian ad litem, told the Haldemans' attorney Robert Kim, Esq. that all his efforts to reunify the family would be in vain because they would never allow reunification and the Haldemans would never get back their children. ER 754-2 at 55-56.

In the first foster home, the Haldeman children were neglected and emotionally, verbally, and physically abused. ER 802-9 at 9, 802-11 at 47-48. The Haldemans filed several motions to bring this abuse to the family court's attention in the hope that the court would intervene to stop the abuse. ER 754 at 40-41. The DHS eventually removed the children to another foster home – that of Defendant David Kaulia. ER 802-9 at 9, 802-1 1 at 56. The DHS had records of Kaulia's alcohol abuse, domestic violence, and emotional abuse of his biological daughter who had been sexually abused by a family member. Id. While in Kaulia's care and custody, Benjamin

watched Kaulia sexually abusing his sister Vanessa. ER 802-9 at 9, 802-11 at 68-69.

The criminal charges against Joseph Haldeman were dismissed in mid-2004 after a brief trial during which two counts of alleged sexual abuse of Vanessa Haldeman were dismissed for insufficient evidence. ER 817 at 17. The third count of alleged child pornography (based on fabricated photographs) resulted in a hung jury – *with eleven jurors voting for acquittal in a matter of minutes* – and the prosecution elected not to retry the charge. Id.

In October 2003, after almost one year of the custody proceeding in the family court, the children's paternal grandparents, Jerry and Carol Haldeman, were given guardianship of the Haldeman children. ER 817 at 17. The Haldeman children were allowed to leave Hawaii to live with their grandparents in the state of Washington. Id. The Washington family court ultimately ordered full restoration of Joseph and Denise Haldeman's parental rights. Benjamin and Vanessa Haldeman were finally reunited with their parents in August 2005 – almost *three years* after they were seized and removed from the family home by Duty and Cupp. ER 817 at 17.

PROCEEDINGS BELOW

1. Plaintiffs' Claims

On December 28, 2005, the Haldemans commenced the present lawsuit in the United States District Court for the District of Hawaii. On

February 16, 2007, Plaintiffs filed amended complaint. ER 140.

Plaintiffs asserted claims against Duty, Cupp, Detective Graves, and a DHS social worker Jill Acero who took over the supervision of the Haldeman children's case from Duty upon their placement in foster care, for violations of Plaintiffs' civil rights under the color of law within the meaning of 42 U.S.C. § 1983, including unlawful seizure and search without probable cause, unlawful interference with Plaintiffs' fundamental right to familial and parental relationships, subjecting Plaintiffs to malicious and fraudulent prosecution in the family and criminal courts based upon fabricated evidence and false testimony, and utilizing threats, coercion, and/or brainwashing techniques to turn Vanessa, Benjamin, and Denise Haldeman into witnesses for the prosecution.

Other Defendants are (1) the DHS and CPS, sued for failure to properly train and supervise the its social workers; (2) the County of Hawaii, sued for failure to properly train and supervise its police officers; (3) Andrea McCullum and her employer, Legal Aid Society as respondeat superior, who acted as guardian ad litem for the children and who actively collaborated and conspired with the other Defendants in falsely prosecuting the Haldemans; (4) Colleen Clark and her employer Child and Family Service as respondeat superior, who was hired as a therapist for the Haldeman children and in that capacity attempted to brainwash the children and provided false testimony in support of the DHS and to the detriment of the Haldemans in the family

court; (5) Bobbette Strauss and her employer, the Institute for Family Enrichment as respondeat superior, who was also hired by the DHS as a therapist for the children and in that capacity attempted to brainwash and improperly influence the children in furtherance of the Defendants' conspiracy; (6) the University of Nations Preschool and its personnel, Director Ruth Golden, and teachers Caroline Hayashi, Patricia Navarro, and Cynthia Noel, sued for negligence/gross negligence in handling Vanessa's sexualized behavior and failure to notify her parents; and (7) David Kaulia, Vanessa's and Benjamin's foster parent, sued for sexual abuse of Vanessa. In addition to the federal law claims under 42 U.S.C. § 1983, Plaintiffs asserted related common law claims under the state law against the state actors and their agents for negligence, gross negligence, infliction of emotional distress, defamation, and professional malpractice, and sought compensatory as well as punitive damages.

2. Motions to Dismiss

Relatively early in the proceeding, the district court granted several state defendants' motions to dismiss. On December 12, 2006, the District Court entered (1) Order Granting Defendants CPS and DHS Motions to Dismiss and (2) Order Granting Defendants Andrea McCollum and Legal Aid Society of Hawaii Motion to Dismiss. Defendants CPS and DHS were dismissed on the grounds of sovereign immunity afforded state governments and their agencies, and Defendants Andrea McCollum and her employer, the Legal Aid Society, were dismissed on

the grounds of quasi-judicial immunity afforded guardians ad litem, as well as the immunity provided by Hawaii Revised Statutes (HRS) § 350-3(b) to persons performing duties under the Hawaii child protective statutes.

Also on December 12, 2006, the district court entered (1) Order Granting Defendants Karen Duty's and Donald Cupp's Motions to Dismiss the Adult Plaintiffs' Claims for Violations of Their Civil Rights Under 42 USC § 1983, on the grounds of the statute of limitations, ER 289, ER 332 and Haldeman v. Golden, 2007 WL 433086 (D. Haw. 2007), and (2) Order Granting in Part Defendant Jill Accro's Motion to Dismiss Plaintiffs' claims against her, on the grounds of (a) witness immunity as to claims of conspiracy to present false testimony, (b) immunity from state law claims under HRS § 350-3(b) except for the claims of conspiracy to develop false criminal charges, and (c) statute of limitations as to the adult Plaintiffs' claims for failure to protect the Haldeman children while in foster care, ER 292, ER 333 and Haldeman v. Golden, 2007 WL 433087 (D. Haw. 2007).

On February 13, 2007, the district court entered Order Granting Defendant Karen Duty's Motion to Dismiss Adult Plaintiffs' State Law Tort Claims and Granting Donald Cupp's Motion to Dismiss Adult Plaintiffs' State Law Tort Claims. ER-370 and Haldeman v. Golden, 2007 WL 521842 (D. Haw. 2007). The February 13, 2007 order dismissed the adult Plaintiffs' common law claims against Duty and Cupp under the state law on the grounds of the statute of limitations.

3. Motions for Summary Judgment

In early 2008, at the close of the discovery phase of the case, virtually all of the Defendants whose claims had not been dismissed filed motions for summary judgment. The district court granted summary judgment in favor of the following Defendants: (1) University of the Nations Preschool and its personnel, Defendants Ruth Golden, Carol Hayashi, Patricia Navarro, and Cynthia Noel, on the grounds of immunity afforded persons reporting suspected child abuse under HRS § 350-3(a), see Haldeman v. Golden, 2008 WL 1932187 (D. Haw. 2008); (2) County of Hawaii, on the grounds of failure to present sufficient evidence in support of a claim for inadequate training of police officers or custom, practice or procedure that led to violations of Plaintiffs' constitutional rights under Monell v. Dep't of Social Services of City of New York, 436 U.S. 658 (1978), see Haldeman v. Golden, 554 F.Supp.2d 1154 (D. Haw. 2008); (3) Colleen Clark and the Child and Family Service, on the grounds of (a) the statute of limitations with respect to the adult Plaintiffs' claims for violations of civil rights under 42 USC § 1983, (b) failure to present evidence of conspiracy to violate Plaintiffs' civil rights, and (c) immunity from state law claims under HRS § 350-3(b), see ER 921; (4) Jill Acero on the grounds that (a) failure to present sufficient evidence of a violation of a constitutional right and (b) failure to present sufficient evidence of participation in a conspiracy to bring false criminal charges, see Haldeman v. Golden, 2008 WL 2080914 (D. Haw. 2008); and (5) Bobbette Strauss and the Institute for Family

Enrichment, on the grounds of (a) statute of limitations with respect to adult Plaintiffs' claims under the federal and state law, (b) failure to present sufficient evidence of participation in a conspiracy to violate Plaintiffs' civil rights, and (c) immunity under HRS § 350-3(b) with respect to Plaintiffs' claims asserted under the common law of Hawaii, see Haldeman v. Golden, 2008 WL 1932188 (D. Haw. 2008).

4. Disposition of Claims against Respondents

The district court granted in part and denied in part Defendants Karen Duty's, Donald Cupp's, and Alexander Graves' motions for summary judgment. See Order Granting in Part and Denying in Part Defendant Karen Duty's Motion for Summary Judgment filed on February 27, 2008, App. at 7a-49a and Haldeman ex rel. Haldeman v. Golden, 2008 WL 515950 (D. Haw. 2008); Order Granting in Part and Denying in Part Defendant Donald Cupp's Motion for Summary Judgment filed on April 15, 2008, App. at 50a-85a and Hadelman ex rel. Haldeman v. Golden, 2008 WL 1732966 (D. Haw. 2008); and Order Granting in Part and Denying in Part Defendant Alexander Graves' Motion for Summary Judgment filed on April 16, 2008, Haldeman v. Golden, 2008 WL 1744804 (D. Haw. 2008).

Based upon a painstaking review of thousands of pages of evidence submitted in connection with the summary judgment motions, the district court determined that there were questions of material fact precluding summary judgment as to:

(1) whether the initial report of alleged sexual abuse was properly investigated by Duty and Cupp prior to continuing the seizure of both children and ordering a medical examination of Vanessa without a court order, see App. B at 45a-46a and App. C at 79a;

(2) whether it was reasonable for Duty and Cupp to believe that Benjamin and Vanessa would likely experience serious bodily harm in the time that would be required to obtain a court order, see App. B at 45a-47a and App. C at 79a-80a;

(3) whether Duty's interview of Vanessa Haldeman was so suggestive that Duty and Cupp should have known it would lead to false responses, see App B at 46a and App. C at 79a-80a;

(4) whether it was reasonable for Duty and Cupp to make the decision to place both children in foster care prior to interviewing the non-offending parent when there was no corroboration of the alleged abuse and they should have known that Joseph Haldeman and Denise Haldeman were innocent, see App. B at 47a and App. C at 79a-80a;

(5) whether it was reasonable for Duty and Cupp to file a dependency petition in the family court when the allegations of sexual abuse were not corroborated and prior to interviewing the non-offending parent, see App. B at 47a;

(6) whether the misstatements and omissions in the dependency petition filed by Duty and Cupp in the family court were fabrication of evidence made with deliberate indifference to Plaintiffs-Appellees' rights, see App. B at 40a and App. C at 81a-82a;

(7) whether Duty and Cupp had authority to order the intrusive medical examination of Vanessa Haldeman, whether they approved the exam, whether they could have delayed the exam until there was a court order, or parental consent, or continued investigation, and whether they knew or should have known, at the time when the exam was ordered, that Benjamin Haldeman did not corroborate the allegations of sexual abuse, see App. B at 47a-48a and App. C at 80a;

(8) whether Duty and Cupp conspired to produce fabricated evidence in the form of the dependency petition that contained material misstatements of fact and/or omissions with the intent that the family court rely on it causing the parents to lose custody, see App B at 48a-49a and App. C at 82a-83a; and

(9) whether it was within the scope of Duty's and Cupp's employment as a social workers to (a) decide to assume foster custody of both Vanessa and Benjamin without having interviewed their mother, Denise Haldeman, (b) making family court filings containing claims that Benjamin had corroborated the allegations of sexual abuse, when in fact there was no such corroboration, and making material omissions in the filing, (c) conspiring to continue making such claims of corroboration, and (d) allowing the intrusive medical examination to be performed on Vanessa without either prior consent of her mother or court order, see App. B at 35a-37a and App. C at 72a-73a.

Essentially, the District Court ruled that Duty and Cupp were not entitled to summary judgment with respect to the minor Plaintiffs' claims because

there were genuine issues of material fact as to whether they (1) conducted the interview of Vanessa in a manner so suggestive and coercive that they should have known that it would produce false responses, and therefore the taking of the minor Plaintiffs into foster custody was unjustified, see Devereaux v. Abbey, 263 F.3d 1070 (9th Cir. 2001); (2) allowed an intrusive medical examination of Vanessa without proper justification, see Wallis v. Spencer, 202 F.3d 1126 (9th Cir. 2000); and (3) made false claims that Benjamin corroborated allegations of sexual abuse of Vanessa and conspired to fabricate evidence by making such false claims in the petition for foster custody of the minor Plaintiffs submitted to the family court, see Beltran v. Santa Clara County, 514 F.3d 906 (9th Cir. 2008).

The District Court ruled that Detective Graves was entitled to summary judgment with respect to the adult Plaintiffs' claims on the grounds of the statute of limitations, with the exception of the claim for malicious prosecution against Plaintiff Joseph Haldeman and conspiring to bring criminal charges against him based upon coerced, manipulated, and fabricated evidence. The district court also denied Detective Graves' motion for summary judgment with respect to the minor Plaintiffs' claims based upon (1) participating in the interview that was so suggestive that the interviewers should have known that it would lead to false responses, (2) continuing the seizure of the children without proper investigation and corroboration of the allegations of sexual abuse and (3) subjecting Vanessa Haldeman to an intrusive medical examination without proper

justification. See Haldeman v. Golden, 2008 WL 1744804 (D. Haw. 2008).

In addition to Plaintiffs' claims against Defendants Duty, Cupp, and Detective Graves that survived the summary judgment motions, as set forth supra, also pending in the district court remained Plaintiffs' claims of sexual abuse of Vanessa against David Kaulia, the former foster parent of the Haldeman children, who is an indigent resident of the Island of Hawaii, state of Hawaii.

5. Respondents' Appeal to the Ninth Circuit

Duty and Cupp appealed to the Untied States Court of Appeals for the Ninth Circuit those portions of the district court's decision that denied in part their claims of official immunity, and Plaintiffs cross-appealed those portions of the district court's decision that granted in part the claims of official immunity. On November 6, 2008, the court of appeals dismissed Plaintiffs' cross-appeals for lack of appellate jurisdiction holding that an order granting partial summary judgment with respect to official immunity was not an appealable final judgment.

The appellate court's panel of three judges heard oral arguments in this appeal on October 14, 2009. Unfortunately, during the oral arguments, the attorneys for Duty and Cupp made several misrepresentations and/or misleading statements that apparently confused the panel and shifted the focus of the proceeding to issues that were not before the court or were not part of the record. They misrepresented the underlying facts, the claims and arguments made by Plaintiffs, and the state and

federal law as it relates to this case. The confusion of the panel is reflected in one of the final questions asked by a member of the panel: "Were constitutional claims asserted in the trial court?" Even the attorney for Duty, to whom the question was posed during his rebuttal, was perplexed.

Within six weeks, the panel issued the Memorandum, approximately four (4) pages long and containing a total of ten (10) brief paragraphs, that summarily reversed the District Court's decision and directed dismissal of all claims against Karen Duty and Donald Cupp. See App. at 1a-6a. The Memorandum is not designated for publication and it is not possible to discern from the Memorandum the precise reasons for the reversal and dismissal. See id. The Memorandum makes a series of conclusory statements contradicting the law and the record, to the effect that Plaintiffs' various claims were not supported by any evidence in the record, as discussed infra.

On February 20, 2010, the Ninth Circuit denied Petitioners' petition for panel rehearing or rehearing en banc. App. at 86a-87a.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with this Court's decisions in Behrens v. Pelletier, 516 U.S. 299, 116 S.Ct. 834 (1996) and Johnson v. Jones, 515 U.S. 304, 115 S.Ct. 2151 (1995), and the Ninth Circuit's decisions in Devereaux v. Abbey, 263 F.3d 1070 (9th Cir. 2001); Beltran v. Santa Clara County, 514 F.3d 906 (9th Cir. 2008); and Wallis v. Spencer, 202 F.3d

1126 (9th Cir. 2000). This Court should review and correct the Ninth Circuit's holdings contrary to Johnson and Behrens and to correct the Ninth Circuit's misconstruction of the law espoused in Devereaux, Wallis, and Beltran.

In Johnson, this Court held that the district court's determination that the summary judgment record raised genuine issues of fact was not reviewable upon an interlocutory appeal of the district court's denial of qualified immunity. Johnson, 515 U.S. at 313. In Behrens, this Court explained that determinations of evidentiary sufficiency at summary judgment are not immediately appealable in a qualified-immunity case and that summary judgment determinations are appealable only insofar as they resolve a dispute concerning an abstract issue of law relating to qualified immunity - typically, the issue whether the federal right allegedly infringed was "clearly established." Behrens, 516 U.S. at 313. See also Eng v. Cooley, 552 F.3d 1062, 1067 (9th Cir. 2009) ("Our interlocutory jurisdiction to review a denial of qualified immunity is limited exclusively to questions of law, which we review de novo. A district court's determination that the parties' evidence presents genuine issues of material fact is categorically unreviewable on interlocutory appeal."); Sanchez v. Canales, 547 F.3d 1169, 1173 (9th Cir. 2009) (same); Tibbetts v. Kulongosky, 567 F.3d 529, 535 (9th Cir. 2009) ("Our jurisdiction is limited to questions of law and does not extend to qualified immunity claims involving disputed issues of material fact."); Lee v. Gregory, 363 F.3d 931, 932

(9th Cir. 2004) ("The district court's determination that the parties' evidence presents genuine issues of material fact is not reviewable on an interlocutory appeal.").

The Ninth Circuit incorrectly reviewed this appeal under the de novo standard, citing Elder v. Holloway, 510 U.S. 510, 114 S.Ct. 1019 (1994). See App. at 2a. In Elder, which predates Johnson and Behrens, supra, the Supreme Court merely held that questions of law, such as whether an asserted federal right was clearly established at a particular time, must be resolved de novo on appeal. Id. at 516, 114 S.Ct. at 1023. There is no suggestion in Elder that an appellate court could reevaluate the evidence in the record in order to determine whether it was sufficient to create a genuine issue of material fact as to the conduct that the district court found to be not covered by official immunity.

The court of appeals improperly and in contravention of Johnson and Behrens made the following determinations of factual issues:

(1) "Duty and Cupp are entitled to summary judgment for taking custody of the Haldeman children. . . . Duty and Cupp . . . had good cause to believe that parental sexual abuse had occurred. Duty and Cupp did not need a court order to take custody of the children because they had reasonable cause to believe that both children were in imminent danger of serious bodily injury." App. A at 3a-4a.

If this refers to the initial seizure, then the issue was not the subject of this appeal, although it became the focus of the oral argument.[2]

However, with respect to the issue of continued custody of the children and the placement of the children in foster care after the interviews, the district court determined that the evidence was sufficient to create multiple questions of fact for the jury, precluding summary judgment. The evidence of improper investigation cited by the district court includes the facts that Duty coached Vanessa prior to the interview, Duty placed an earpiece in Vanessa's ear during the interview through which Vanessa received instructions from Detective Graves, Vanessa stated that she was tired and wanted the interview to be over, the expert reports stating that the interview was conducted in a manner violating established guidelines for interviewing suspected victims of child sexual abuse, leading to a suggestive interview with coerced and inaccurate responses, and failure to interview the non-offending parent when there was lack of corroboration of the alleged abuse. The evidence cited by the district court regarding the lack of imminent danger of serious bodily harm in

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[2] The Memorandum erroneously cites Wallis v. Spencer for the proposition that the constitutional right of parents and children to live together is limited by the government's need to investigate serious claims of abuse. App. A at 3a (citing Wallis, 202 F.3d at 1138). Wallis stands for the proposition that the government "cannot seize children suspected of being abused or neglected unless reasonable avenues of investigation are first pursued." Id. However, the Ninth Circuit panel's erroneous reference to Wallis strongly suggests that it focused upon the initial seizure of the children for the purpose of investigation.

the time required to obtain a warrant included the facts that the children were seized on a weekday during school hours, the courts were still open after the interviews, and the children did not need to be sent home before the end of the day. The determination that the record raised genuine issues of fact is not reviewable upon the interlocutory appeal of the district court's denial of qualified immunity. See Johnson, Behrens, Eng, Sanchez, Tibbetts, Lee, supra.[3]

(2) "Duty and Cupp are entitled to absolute immunity against claims based on the filing of a custody petition in family court." App. A at 4a (citing Beltran). This directly contradicts Beltran, 514 F.3d at 908, inasmuch as Plaintiffs' claims are based upon deliberate falsification of evidence in the custody petition filed by Duty and Cupp.

(3) "Duty and Cupp are also entitled to qualified immunity against claims that they deliberately falsified evidence. The Haldeman children fail to support their claim of deliberate evidence

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[3] It is not clear on what basis the panel in this case made the determination that Duty and Cupp "had good cause to believe that parental sexual abuse had occurred" and "had reasonable cause to believe that both children were in imminent danger of serious bodily injury," particularly with respect to Benjamin Haldeman. In the Ninth Circuit, "specific, articulable evidence" of "imminent danger" is required to remove a child from parental custody without a court order. Wallis, 202 F.3d at 1138. The District Court correctly held that the issue was for a jury to determine. C.f., Mabe v. San Bernardino County, 237 F.3d 1101 (9th Cir. 2001); Rogers v. County of San Joaquin, 487 F.3d 1288 (9th Cir. 2007); Bhatti v. County of Sacramento, 281 Fed. Appx. 764 (9th Cir. 2008).

falsification with anything other than expert reports that criticize Duty and Cupp's interviewing techniques." App. A at 4a.

This is simply not true. As recognized by the district court, the evidence is found directly in the petition prepared by Duty and Cupp and submitted to the family court and in the transcript of Benjamin's interview, both of which are part of the record herein. See ER 802-44, 802-50, and Donald Cupp's ER 778 at Ex. "O". The district court in its written decision stated that it could not find anywhere in the transcript of Benjamin's interview the corroboration of the allegations of sexual abuse of Vanessa that is claimed in the petition prepared by Duty and Cupp and submitted to the family court, see App. B at 20a-21a, and on that basis denied Duty's and Cupp's summary judgment motions with respect to the deliberate falsification of evidence claim. Again, the issues of sufficiency of the evidence should not have been addressed by the court of appeals.

The district court correctly recognized that Plaintiffs' claims of deliberate fabrication of evidence were based upon the false statements and material omissions made by Duty and Cupp in the dependency petition filed in the family court. The court of appeals in its Memorandum decision apparently ignored that issue altogether.

Although the district court did not rely upon Plaintiffs' expert opinions in determining that there was sufficient evidence of deliberate falsification of evidence by Duty and Cupp, the court of appeal's Memorandum inexplicably mentions the expert

reports in that context, followed by a quotation from Devereaux v. Abbey, 263 F.3d 1070, 1075 (9th Cir. 2001) that "there is no constitutional due process right to have child witnesses in a child sexual abuse investigation interviewed in a particular manner, or to have the investigation carried out in a particular way." App. A at 4a. Duty and Cupp focused their efforts in the district court and on appeal upon arguing that the expert opinions should be disregarded because, as a matter of law, they could not create an issue of material fact that would allow a case like this to proceed to trial. Even during the oral argument they repeated like a mantra their position that Plaintiffs' claims amounted to arguing that the interview should have been "conducted in a particular manner."

Although Plaintiffs' claims in no way rely solely, or even primarily, upon their experts' opinions, the issue of the effect of the expert opinions is clearly of critical importance in this case. The Ninth Circuit panel in the Memorandum did not directly address the issue, but the foregoing language quoted from its Memorandum suggests that the panel accepted Duty's and Cupp's argument that, regardless of the interviewing techniques used, a defendant cannot be held liable for fabrication of false evidence under Devereaux based upon expert testimony.

In fact, it suggests that faulty interviewing techniques cannot be the basis for a claim of deliberate fabrication of evidence. This surely is not a correct reading of Devereaux. The Devereaux court held that a plaintiff may establish a deliberate fabrication claim by pointing to evidence that shows

that the defendant "used investigative techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false information." Id. at 1076.

(4) "Duty and Cupp are entitled to summary judgment for claims that they caused Vanessa's medical exam. No evidence in the record links Duty and Cupp to the authorization or performance of the medical exam. . . . The Haldeman children offer no evidence of Duty's or Cupp's personal participation." App. A at 4a.

Again, this is simply not true. The district court noted in its written opinions that there was evidence that Duty and Cupp had authority to order such exam and they had not explained if they approved of the exam, and that there were questions of fact as to whether their approval was necessary and whether they should have delayed the examination until they either obtained a court order or parental consent. There is no question that, under Hawaii law, the children were legally in the custody of the DHS, represented in this case by Duty and Cupp, at the time of the exam. See HRS § 587-22(b). Detective Graves testified in his deposition that it was Duty's ultimate decision to go forward with the examination, see ER 802-30 at 80, contemporaneous notes made by a school teacher indicate that Duty participated in the process of checking in Vanessa to the hospital, see ER 802-46, and the report of the sexual assault nurse examiner at the hospital indicates that Cupp brought Vanessa Haldeman to the hospital and signed the authorization for the

exam, see ER 802-47. All of this evidence is part of the record.

(5) "Duty and Cupp are entitled to summary judgment on count [two], which alleges a civil conspiracy. . . . [N]o evidence in the record supports the existence of an arrangement to carry out that exam." App. A at 5a.

The Ninth Circuit panel incorrectly limited the scope of the conspiracy claims to the medical exam issue, and incorrectly concluded that there was no evidence of a conspiracy. The district court found that there was evidence from which a jury could infer that Duty and Cupp conspired to produce the fabricated evidence in the dependency petition presented to the family court and to support their decision to subject Vanessa to the medical examination and to continue to seize the children without a warrant. That evidence includes the evidence of meetings regarding the case and the evidence that the petition was prepared by Cupp under Duty's supervision. The weight of the evidence was not subject to review in this appeal.

(6) "The district court incorrectly denied state law immunity to Duty and Cupp on all counts." App. A at 5a.

The Ninth Circuit panel's reasoning that the Hawaii law provided at least the same level of immunity as provided under the federal law is not supported by any authority. Its disposition of the state law claims through erroneous application of the federal immunity law to the state law claims simply avoided the complex issues raised by the district

court's disposition of the multiple state law claims in this action. The district court ruled that the state law provided absolute immunity to persons performing duties under the Hawaii Child Protective Act, but determined that certain actions of Duty and Cupp were not performed within the scope of their responsibilities, and therefore they were not entitled to immunity for those acts. The district court's determination was once again supported by the evidence cited in the district court's decisions, see App B at 35a-36a and App. C at 72a-73a, and the sufficiency of the evidence is not reviewable on interlocutory appeal of denial of official immunity.

This case is important as a test for real-world applicability of the legal principles developed in Devereaux, Beltran, and Wallis. In Devereaux, the Ninth Circuit enunciated the elements of a deliberate-fabrication-of-evidence claim in the context of a defective interview of alleged child abuse victim, but it held that the plaintiff in that case failed to make the required allegations in spite of repeated opportunity to do so. Id. at 1076-82. Plaintiffs in this case endeavored to prepare their case guided by the Devereaux principles.

Child sexual abuse interviewing is by its nature an area requiring expert knowledge. Duty testified that she interviewed Vanessa because she had the expertise in the area. ER 802-34. Plaintiffs presented evidence of detailed reports from several nationally and internationally recognized experts in the area who scientifically analyzed the video recordings and transcripts of Duty's interview and other circumstances of this case. ER 742-19, 742-20,

742-21, 802-9, 802-10, 802-11. The district court carefully considered that evidence along with the other evidence presented. See App. B at 46a.

If the pleadings and record developed in this case regarding Duty's defective interview of Vanessa are not enough to satisfy the Devereaux test, then it is hard to see what would be enough, and Devereaux would be dead letter. As Judge Kleinfeld of the Ninth Circuit warned in dissent in Devereaux v. Perez, 218 F.3d 1045, 1059 (9th Cir. 2000), which was the panel decision that was reversed upon rehearing en banc in Devereaux v. Abbey, supra, "until a judicial decision tells social workers how to conduct interrogation of a child in a sex abuse case, virtually any sort of interrogation is permissible." The effect of the Memorandum decision is to send a signal that indeed "any sort of interrogation is permissible." Review by this Court and reversal of the Memorandum decision is necessary to make it clear that it is not so.

In Beltran, the Ninth Circuit held that social workers did not have immunity from "claims that they fabricated evidence during an investigation or made false statements in a dependency petition affidavit that they signed under penalty of perjury." Beltran, supra, at 908. Here, the district court made a finding of fact that Duty and Cupp's filings in the family court **"included false statements."** App. B at 40a (emphasis added).

The district court scrutinized the documents filed by Duty and Cupp and the transcript of Benjamin's interview and found **no** evidence of corroboration of Vanessa's sexual abuse by her father in the

interview. App. B at 20a-21a. Instead, the district court found that by "making false statements in a dependency petition with the intent that the court rely on it, causing the parents to temporarily lose custody," Duty and Cupp "seriously infringe[d] ... parent's constitutional rights." App. B at 48a; see also App. C at 76a.

The court of appeals turned a blind eye on the underlying record and the district court's findings of fact based upon the record. The Ninth Circuit panel simply ruled that Duty and Cupp were entitled to immunity "against claims based on the filing of a custody petition in family court," citing Beltran, 514 F.3d at 908. App. 4a. Nothing more was said. However, Beltran does not support the panel's decision; it stands for a diametrically contrary proposition.

The court of appeals granted summary judgment to Duty and Cupp "for claims that they caused Vanessa's medical exam." App. at 4a. The court of appeal's decision conflicts with Wallis, supra. In Wallis, the Ninth Circuit has held that "the State is required to notify parents and to obtain judicial approval before children are subjected to investigatory physical examinations." Id at 1141. Before Vanessa was made to undergo an intrusive medical examination, the Duty and Cupp did not notify her parents. Nor did they obtain judicial approval for the medical exam. These facts are undisputed and uncontroverted.

The district court made a specific determination that "there [was] a question of fact" as to whether Duty and/or Cupp had a role to play in ordering the

medical exam of Vanessa. App. at 48a. The district court's determination is supported evidence in the record that linked Duty and Cupp to the authorization of the medical exam on Vanessa. See ER 802-30 at 80 (testimony of Detective Graves that Duty made the decision to subject Vanessa to the exam); ER 802-47 (report of the sexual assault nurse examiner that Cupp brought Vanessa to the hospital and signed the authorization).

Considering all of this evidence on record, it is simply outrageous as to how the appellate court could rule that "no evidence in the record links Duty and Cupp to the authorization or performance of the medical exam." App. 4a. The Ninth Circuit panel did not attempt to distinguish the applicability of the Wallis decision to the facts of the present case. Instead, the panel simply made up facts to make an end run around the Wallis decision and to support its grant of summary judgment.

For the past four years the Haldeman family – the grandparents, the parents, and the children – have fought a battle against the Hawaii social workers to redress the violation of their constitutionally protected rights. For the past four years, the Haldeman family has presented solid evidence in support of their federal causes of action including but not limited to their claims of deliberate fabrication of evidence by social workers Duty and Cupp. The appellate court's 6-page unpublished decision obliterates all that this family has fought for and won in the district court. Even more galling is the fact that the appellate court's decision is contrary

to the well established law and against the record in this case.

Plaintiffs-Petitioners beseech this Court to grant this petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 2010

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Filed Nov. 23, 2009]

VANESSA HALDEMAN; et al., Plaintiffs-Appellees, v. RUTH GOLDEN, in her individual capacity; et al., Defendants, and KAREN DUTY, in her individual capacity, Defendant-Appellant.	No. 08-15648 D.C. No. 05-CV-00810-DAE-KSC MEMORANDUM*
VANESSA HALDEMAN; et al., Plaintiffs-Appellees, v. RUTH GOLDEN, in her individual capacity; et al., Defendants, and DONALD CUPP, in his individual capacity, Defendant-Appellant.	No. 08-16352 D.C. No. 05-CV-00810-DAE-KSC

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court for the District of Hawai'i, David A. Ezra, District Judge, Presiding

Argued and Submitted Oct. 14, 2009

Before BEEZER, GRABER and FISHER, Circuit Judges.

State social workers Karen Duty and Donald Cupp appeal from the district court's partial denial of qualified immunity from child-plaintiffs Vanessa and Benjamin Haldeman's 42 U.S.C. § 1983 and state law claims. We have jurisdiction over interlocutory appeals taken from a district court's denial of summary judgment based on a claim of qualified immunity. *Mitchell v. Forsyth,* 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). We review a district court's denial of qualified immunity de novo on appeal. *Elder v. Holloway,* 510 U.S. 510, 516, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994). We reverse the district court's denial of qualified immunity.

The facts of this case are known to the parties. We do not repeat them.

The claims contained in counts 1, 2, 4, 5, 7, 8 and 10 of the Haldeman children's second amended complaint as alleged against Duty and Cupp are properly before the court on appeal. We do not decide any other issues as to any other parties.

I

Counts 1 and 2 of the Haldeman children's second amended complaint contain their § 1983 claims and conspiracy claims against Duty and Cupp. Qualified immunity protects § 1983 defendants from civil liability unless their conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Under *Pearson v. Callahan,* the court may determine whether the constitutional right asserted was clearly established at the time of the alleged violation without first determining whether the defendants actually violated a constitutional right. --- U.S. ----, ----, 129 S.Ct. 808, 818, 172 L.Ed.2d 565 (2009).

A

The district court incorrectly denied Duty and Cupp qualified immunity against the constitutional claims contained in count 1, including claims resting on allegations of assuming custody of the Haldeman children, filing a petition in the family court and causing Vanessa's medical examination.

Duty and Cupp are entitled to summary judgment for taking custody of the Haldeman children. The clearly established constitutional right of parents and children to live together without government interference, *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), is limited by the government's need to investigate serious claims of abuse. *Wallis v. Spencer,* 202 F.3d 1126, 1138 (9th Cir.2000). Duty and Cupp had a serious and

important obligation to protect child welfare and had good cause to believe that parental sexual abuse had occurred. Duty and Cupp did not need a court order to take custody of the children because they had reasonable cause to believe that both children were in "imminent danger of serious bodily injury." *Id.*

Duty and Cupp are entitled to absolute immunity against claims based on the filing of a custody petition in family court. *See Beltran v. Santa Clara County,* 514 F.3d 906, 908 (9th Cir.2008) (per curiam) (en banc). Duty and Cupp are also entitled to qualified immunity against claims that they deliberately falsified evidence. The Haldeman children fail to support their claim of deliberate evidence falsification with anything other than expert reports that criticize Duty and Cupp's interviewing techniques. "[T]here is no constitutional due process right to have child witnesses in a child sexual abuse investigation interviewed in a particular manner, or to have the investigation carried out in a particular way." *Devereaux v. Abbey,* 263 F.3d 1070, 1075 (9th Cir.2001) (en banc).

Duty and Cupp are entitled to summary judgment for claims that they caused Vanessa's medical exam. No evidence in the record links Duty and Cupp to the authorization or performance of the medical exam. The Haldeman children thus bear the burden of providing evidence demonstrating a genuine issue of material fact for trial. Fed. R. Civ. P. 56(e); *Devereaux,* 263 F.3d at 1076. The Haldeman children offer no evidence of Duty's or Cupp's personal participation.

B

Duty and Cupp are entitled to summary judgment on count 2, which alleges a civil conspiracy. A civil conspiracy claim, as opposed to a claim under 42 U.S.C. § 1985, holds private actors liable under § 1983 when they conspire with state actors to violate a person's constitutional rights. *Tower v. Glover,* 467 U.S. 914, 920, 104 S.Ct. 2820, 81 L.Ed.2d 758 (1984). It is not a means of holding state actors liable on claims from which they are otherwise immune. While the existence of a conspiracy would eliminate the requirement that Duty and Cupp personally participated in Vanessa's medical exam, no evidence in the record supports the existence of an agreement to carry out that exam.

II

Counts 4, 5, 7, 8 and 10 of the Haldeman children's second amended complaint raise claims of negligence, gross negligence, intentional infliction of emotional distress, social worker malpractice and invasion of privacy. All of these claims are based on Duty and Cupp having taken custody of the Haldeman children, filing the custody petition in family court and causing Vanessa's medical examination.

The district court incorrectly denied state law immunity to Duty and Cupp on all counts. Hawaii state law provides immunity to state social workers investigating child abuse cases for acts performed within the scope of their duties. Haw. Rev. Stat. § 350-3(b). This statute provides at least the same level of immunity as provided under federal law. The

same analysis above therefore applies to the state law claims.

The district court is directed to dismiss all claims against Duty and Cupp.

REVERSED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

[Filed Feb. 27, 2008]

VANESSA HALDEMAN & BENJAMIN HALDEMAN, BY THEIR PARENTS AS NEXT FRIENDS; JOSEPH & DENISE HALDEMAN;JOSEPH HALDEMAN,individually; DENISE HALDEMAN, individually; JERRY HALDEMAN, individually; & CAROL HALDEMAN, individually, Plaintiffs, v. RUTH GOLDEN, in her individual capacity; PATRICIA NAVARRO, in her individual capacity; CAROLINE HAYASHI, in her individual capacity; CYNTHIA NOEL, in her individual capacity; UNIVERSITY OF NATIONS PRE-SCHOOL, a Private Agency; THE UNIVERSITY OF NATIONS as Respondeat Superior; ALEXANDER	CV No. 05-CV-00810-DAE-KSC

GRAVES, in his individual capacity; COUNTY OF HAWAII, a municipal entity; KAREN DUTY, in her individual capacity; DONALD CUPP, in his individual capacity; JILL ACERO, in her individual capacity; BOBBETTE STRAUSS, in her individual capacity; CHILD PROTECTIVE SERVICES, an agency of the Department of Human Services; DEPARTMENT OF HUMAN SERVICES [DHS], State of Hawaii; LILLIAN KOLLER, Director of DHS, in her official capacity; ANDREA MCCOLLUM, in her individual and professional capacity; LEGAL AID SOCIETY OF HAWAII, a Private Non-Profit Agency; DAVID KAULIA, in his individual capacity; COLLEEN CLARK, in her individual and professional capacity; CHILD AND FAMILY SERVICE, a Private Non Profit Agency; Jointly and Severally, Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT KAREN DUTY'S MOTION FOR SUMMARY JUDGMENT

DAVID ALAN EZRA, District Judge.

The Court heard the Defendant Karen Duty's motion on February 25, 2008. William Deeley, Esq., and John Winnicki, Esq., appeared at the hearing on behalf of Plaintiffs; John R. Molay, and Candace Park, Deputy Attorneys General, appeared at the hearing on behalf of Defendant Karen Duty; Joseph K. Kamelamela, Deputy Corporation Counsel, appeared at the hearing on behalf of Defendant Alexander Graves; Julie A. Passa and Maura M. Okamoto, Deputy Attorneys General, appeared at the hearing on behalf of Defendant Donald Cupp; E. Mason Martin, III, Esq., and H. Shan Wirt, Esq., appeared at the hearing on behalf of Defendants Ruth Golden, Patricia Navarro, Caroline Hayashi, Cynthia Noel, University of Nations Pre-School, and The University of the Nations; Jeffrey S. Masatsugu, Esq., appeared at the hearing on behalf of Defendant David Kaulia; and John P. Gillmor, Michael S. Vincent, and Ryan S. Endo, Deputy Attorneys General, appeared at the hearing on behalf of Defendant Jill Acero. After reviewing the motion and the supporting and opposing memoranda, the Court GRANTS IN PART AND DENIES IN PART Defendant Duty's Motion for Summary Judgment. Duty is entitled to immunity on the state law tort claims for only some of her conduct. Likewise, Duty is entitled to qualified immunity on the federal claims brought pursuant to 42 U.S.C. § 1983 as to

only some of her conduct. With respect to the conspiracy claim, Plaintiff has presented enough facts to survive summary judgment based on an alleged conspiracy between Duty and Cupp to present fabricated evidence to Family Court.

BACKGROUND

In 2002, Defendant Karen Duty was employed as a supervisor of the West Hawaii Assessment Unit in the Child Welfare Services Branch of the Social Services Division of the State of Hawaii Department of Human Services ("DHS"). Duty does not have a degree in social work and she is not licensed or certified by a state as a social worker. Duty does, however, have a Bachelor of Sciences degree in Criminal Justice and an Associates Degree in Applied Science for Correctional Technology from the University of Toledo. Prior to being a supervisor, Duty worked for five and one-half years as an investigator for DHS.

In 2002, then four-year-old Vanessa Haldeman attended preschool at the University of Nations Preschool. According to notes taken by preschool personnel, in May 2002, Vanessa exposed her private area during nap-time and also exposed her private area to a boy and asked him to do the same. In July 2002, Vanessa pulled down her underpants and asked another girl to do the same. On July 17, 2002, Vanessa asked a young boy to touch her private area. Director Ruth Golden of the University of Nations Preschool contacted Child Protective Services of the State of Hawaii's Department of Human Services ("CPS") that same day. CPS did not start an investigation.

On October 9, 2002, Denise Haldeman, Vanessa's mother, reported to the preschool that her daughter had been exposed to pornography on the Internet, which depicted oral sex. On October 11, 2002, Vanessa asked a boy to look under her dress and her underwear was pulled down. On October 15, 2002, Vanessa forced a girl's head into her lap. On October 18, 2002, Vanessa asked other children to take their underpants off. There is a dispute as to whether the preschool staff discussed each of these behaviors with Vanessa's parents, or informed them that they had occurred. According to the preschool, they informed Denise Haldeman of at least some of the behavior and she responded that Vanessa and her eight-year-old brother Benjamin bathed together, and that she would stop that.

On October 23, 2002, Vanessa's teacher, Carol Hayashi, came into Golden's office because Vanessa allegedly stated that she wanted to tell her a secret. Vanessa told Golden and Hayashi that her daddy had shown her his tinkler, he had sucked on her private areas, and asked her to suck on his private areas. She also told Golden and Hayashi that her mommy tells her to stay away from daddy and not to talk about it because it is potty talk. Golden made notes of this conversation and contacted CPS.

On October 24, 2002, Duty and another Defendant, Hawaii Police Detective Alexander Graves ("Graves"), went to the preschool and met with Golden and Hayashi. Golden and Hayashi informed Duty and Graves that Vanessa had exposed her genitals to classmates on a number of occasions, invited a boy to look under her dress and had been

found with the boy's head under her dress with her underpants down, forced another girl's head onto her lap, and invited other children to take off their underpants. This conduct had been witnessed by various different teachers and documented in a notebook kept by the preschool, which predated the call to CPS by several months. Duty and Graves did not interview each of the teachers who directly witnessed the alleged conduct that was noted in the notebook. Golden and Hayashi also informed Duty that Vanessa had told preschool employees that her father did not wear clothes at night and showed his tinkler often and that Vanessa had told her mother about her father exposing himself to her and her mother's response was to not talk about it. Golden also indicated that Vanessa's mother stated that Vanessa and her eight-year old brother Benjamin took baths together. There are no recordings or notes of this conversation between Duty, Graves, Golden, and Hayashi.

Based on this information, Detective Graves took Vanessa into custody and transferred custody to Duty. While at the preschool, Duty spoke to Vanessa. Duty claims she told Vanessa that they would be going to another location to talk and that no interview took place at the preschool. Although Plaintiffs point out that Duty spoke to Vanessa at the preschool, they do not allege that she said anything improper at this time.

By directive from Duty, Defendant Donald Cupp went to Benjamin Haldeman's school and picked him up. Duty had told Cupp that there was a concern that Vanessa was being sexually molested by their

father and that their mother was not being protective. Duty then drove herself and Vanessa to the Children's Justice Center for the purpose of conducting the interview. Duty claims that during the drive she did not interview Vanessa. In the transcript of the interview, Duty acknowledges that she and Vanessa spoke in the car. Vanessa, who at the time of her declaration was almost nine years old, claims that during the drive, Duty talked to her about 'suck," "private parts," "secrets," "daddy" and "mommy." Duty disputes the truth of this statement, but argues that it is immaterial to her motion for summary judgment. There are no notes or recordings of the conversation in the car.

At the Center, Duty talked to Vanessa while she gave her a tour of the Center. No notes were made of this discussion. However, Plaintiffs do not assert that Duty said anything improper to Vanessa during this period, other than that Vanessa was shown the interview room and the two-way mirror and she knew that Detective Graves would be watching her. Duty then interviewed Vanessa alone, with Defendants social worker Donald Cupp and Detective Graves observing from another room. The interview was video taped and Plaintiffs have reviewed it. During the interview, Vanessa told Duty that: 1) she does not have a daddy, 2) her daddy died, 3) her daddy lives in a different house, 4) her sister "Keana" died years ago, 5) she has told lies since she was a little girl, 6) her daddy told a lie, 7) he told her to suck his private part, 8) she didn't do it and she told on her daddy, 9) he asked her to do that five times, 10) it really hurt her feelings and she didn't

want her dad to go into her room because he might put his private part on all her toys and "stuck on them with it, um, lil', little mouth," 11) her daddy put his mouth on a toy horse, 12) her daddy put his tinkler on her nose, 13) he touched her private part with his finger, 14) he put his boogers in her nose to get sick, 15) her body felt better when her daddy was touching her private part, and 16) a little booger that is teeny and looks yellow came out of daddy's tinkler. Vanessa identified a drawing of a penis as a tinkler and a drawing of a little girl's genitalia as private parts.[1]

During the above portion of the interview, through questions posed, Duty introduced the concepts of telling the truth versus lying, inside versus outside of Vanessa's private parts, and whether her daddy's tinkler was "hard or squishy."

Approximately 40 minutes into the interview, after Vanessa had provided the answers set forth above, Duty placed the earpiece that she had been wearing into Vanessa's ear. Duty had been wearing the earpiece during the interview so that she could hear any questions that Graves or Cupp may have. Duty placed the earpiece into Vanessa's ear after Vanessa had stated "so you can hear in your ears?". Duty does not consider the placing of the earpiece in Vanessa's ear to have been a breach of protocol in the conduct of the interview. Immediately prior to placing the earpiece in Vanessa's ear, Duty had asked Vanessa whether daddy's tinkler feels hard or squishy and Vanessa stated that she wanted to

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[1] Vanessa has a living father, and never had a sister.

finish soon. Duty stated that she wanted to have Vanessa help her to understand what happened so that Duty could help her and help her daddy. Graves spoke to Vanessa through the earpiece for approximately 35 seconds. Cupp testified that Graves told Vanessa that she was doing a good job. While Graves was speaking to Vanessa, she said "yeah" a few times, "okay," and "I know that." Vanessa claims that the man who spoke to her through the earpiece told her to say "my daddy," "suck," "private parts," "private touching," and "tinkler." No notes were made of this conversation. After speaking to Graves through the earpiece, Duty asked for the earpiece back and said "so what'd he tell you?" Vanessa responded that "um, he kinda, um kinda, touched my private part into his um, um, private part?" Duty responded "Who ... wha ... Who said ... What was that?" Vanessa responded "[h]e kind of touched me into my little private part and it hurt bad." Duty believed that Vanessa was picking up the conversation where they had left off, prior to the earpiece being placed in her ear. Plaintiffs believe that Vanessa was stating what Graves had told her to say.

The interview continued using anatomically correct dolls so that Vanessa could demonstrate what happened. Vanessa stated that: 1) her daddy put his tinkler in her private part, 2) he went to church with no clothes on and her sister came, 3) her mommy touched her private part, 4) her brother has a tinkler, 5) her daddy wants her to die because he does not like her, 6) her daddy put his private part into her private part, and it felt gross, 7) she takes

baths with her brother, 8) she wanted to finish the interview soon, 9) she feels safe with mommy and daddy, 10) her daddy put his mouth on her private part, 11) she wanted to finish the interview quickly, 12) she wanted the interview to be over. Despite Vanessa's requests to end the interview, Duty questioned her for approximately 15 to 20 more minutes. Duty admitted that she should have ended the interview earlier. She states "in my opinion, I should have ended it already. All the significant information was already disclosed by the child. And at this point she's tired and very likely just saying whatever so it can be over with...."

During this portion of the interview, through questions posed, Duty introduced the concepts of feeling safe with mommy and daddy, her mother possibly witnessing her father touching her private parts, daddy touching her brother's private parts, whether Vanessa was worried about her daddy getting in trouble, and her daddy telling her not to tell anyone. Duty also introduced the term secret. Duty recognized during the interview, before it was over, that Vanessa seemed like she was getting tired.

Benjamin Haldeman was then interviewed by Detective Graves. A review of Benjamin's interview shows that he told Detective Graves that: 1) everything is fine at home, 2) hugs, pats, and kisses occur at home, 3) only bad touching at home is spankings, 4) there is no private touching other than being helped by his parents with cleaning his private areas in the bathtub, 5) he bathes with Vanessa, and sometimes his mom or his dad, 6) there is no private touching between he and Vanessa, 7) he does not see

private touching with anyone else in the home, 8) Vanessa talks about private touching to their mom during the bath and after the bath, for example, Vanessa takes her clothes off and "she plays with her business" and "talks gross talk" "like look at my butt," 9) he has never seen his father engage in private touching with Vanessa, 10)Vanessa has never told him about their father doing private touching, 11) he has helped Vanessa clean herself sometimes, 12) he only touched her private areas when he walked on her butt when he got mad at her, 13) Vanessa once lifted up his private parts, she was just playing, and he asked her to stop it and said that is gross, and she would not stop, 14) he has not seen Vanessa touch anyone else's private parts, 15) the term "potty talk" means gross stuff like "butt head, butt face, butt ears," 16) he and Vanessa use "potty talk," but his mom and dad do not use "potty talk," 17) his dad uses the word tinkler, his mom uses the word penis, he taught Vanessa to say weiner, but he normally calls it tinkler, 18) he has heard his sister talk about a tinkler, 19) he has a good house, 20) sometimes at home he feels uncomfortable when he has to put wart medicine on his warts, 21) he and his sister and mom saw an email that had naked pictures of adults on the computer and his mom said do not look at the pictures and she tried to change the email address and get the pictures off of the computer, 22) his dad walks around naked, and 23) his dad does not care if the family sees his private parts when he is getting dressed because they are all family.

Plaintiffs claim that Duty observed the interview of Benjamin and that she spoke with Graves through a microphone during the interview five separate times. Plaintiffs, however, do not allege that Duty said anything improper to Benjamin. Duty states that she does not recall observing the interview. According to Duty, she was later advised by Cupp that Benjamin stated the following: he was aware that his father touched Vanessa on her private parts, Vanessa had told their mother and she advised Vanessa not to discuss it any further, Vanessa told Benjamin that their father had shaken his tinkler over her, Vanessa and Benjamin take baths and showers together, their father walks around with his private parts showing, and Vanessa would play with Benjamin's private parts even after he asked her to stop.

Detective Graves requested that a sexual assault nurse examiner conduct a colposcopic genital exam of Vanessa. There was no court order or parental consent for this examination. No injuries were found to Vanessa's genitalia and her hymen was found intact. However, the nurse noted in her report that such a finding did not rule out sexual abuse.

Based upon the information provided by the staff at the preschool, Vanessa's interview statements, and Benjamin's interview statements, Cupp, in consultation with Duty, concluded that Vanessa had been sexually abused by her father. Duty approved Cupp's decision to assume temporary foster custody of the children and file a petition with the Family Court. According to Duty, DHS Guidelines require an immediate face-to-face contact with an alleged child

victim to assess safety. This includes interviewing the child victim, interviewing siblings, the non-offending parent, and the alleged offender, and a medical exam if it was warranted, and then make a determination for the family. Despite these guidelines, Duty did not call or talk to the children's mother, Denise Haldeman, prior to making the determination that Vanessa had been sexually molested by her father. Duty continued to supervise Cupp's work on the Haldeman case until it was transferred from her unit to a different DHS unit in mid-November 2002.

At approximately 6:00 p.m. on the day of the interviews, Cupp informed the parents that their children were in the custody of CPS and that Vanessa had accused her father, Joseph Haldeman, of sexual molestation, and CPS had confirmed the abuse and that Denise had failed to protect Vanessa. On October 25, 2002, Joseph and Denise Haldeman met with Cupp. Cupp again stated that Vanessa had disclosed, and CPS confirmed, sexual abuse by Joseph and that Denise had failed to protect her. Cupp asked the parents to cooperate and enter into a Family Service Plan, which included for Joseph an admission to being a child sex abuser, enrollment in sex offender treatment, taking parenting classes, and submitting to a psychological evaluation, among other things, and for Denise, an admission to failing to protect Vanessa, various therapy sessions, and parenting classes and treatment. The Haldeman parents stated that they believed the process was unfair, that they wished CPS would have talked to

them, and that they would sue Cupp, CPS, and the preschool.

On October 29, 2002, CPS/DHS filed a Petition for Temporary Custody in the Family Court of the Third Circuit. In the Petition filed with the Family Court, signed by Cupp and Duty,[2] Cupp stated that Benjamin stated in his interview that Vanessa told him about her "secret" about the private touching, and that when Vanessa told their mother about the secret, their mother told Vanessa that it is "potty talk." As set forth above, this Court has reviewed the transcript of Benjamin's interview and does not find these statements present in the transcript of the interview. Cupp further stated that DHS had confirmed sex abuse of Vanessa by her father and threatened harm of Benjamin and Vanessa by their parents. Other than the interviews of the children mentioned above, Cupp did not explain the basis for this statement. Cupp stated that Denise and Joseph Haldeman had retained an attorney who advised them not to talk to CPS and that they refused to be interviewed. Cupp did not explain that CPS had made its decision and tried to implement the Family Service Plan without having previously interviewed the parents. Cupp also filed a Safe Family Home Report in the Family Court. The report again provides that Benjamin stated that Vanessa told their mother her secret about the private touching and their mother said that is "potty talk" and to stop it. Cupp also stated that Benjamin confirmed that his sister told him that their father had shaken his

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[2] The Family Court filings were signed by another employee, on behalf of Duty.

tinkler over her. Again, this Court cannot find anywhere in the transcript of Benjamin's interview where he stated that Vanessa told him their father shakes his tinkler over her. In the instant motion, Duty continues to allege that Benjamin confirmed these parts of Vanessa's testimony. Duty, however, cites to Cupp's deposition as her support for this corroboration of testimony, rather than to Benjamin's interview.

The Family Court held a hearing on the petition on October 31, 2002. On December 12, 2002, the Family Court issued an order awarding temporary foster custody of the children, effective October 31, 2002. The order states that DHS shall provide videotapes of the interviews of the children to the parents no later than November 8, 2002, and that a there will be a contested adjudication hearing on December 27, 2002. Neither party has indicated to this Court whether the Family Court reviewed the interview videotapes or read the transcripts prior to making the custody decision, or if the Family Court relied mainly on Cupp's version of Benjamin's interview.

In November 2002, Joseph Haldeman underwent a polygraph lie detector test during which he was directly questioned as to whether he had specifically put his mouth on Vanessa's vaginal area, or his penis in her mouth and other such questions based on Vanessa's allegations. Joseph denied all of Vanessa's allegations and the polygraph examiner found him to be truthful.

Duty was expected to attend a case conference meeting concerning the Haldeman family on

December 12, 2002, where various persons involved, including Cupp and Graves, would discuss their up-to-date involvement in the case. Handwritten notes of the meeting indicate that she was present. Duty was also expected to attend a case conference in early April 2003. Duty does not recall actually attending either of these meetings.

Duty testified in Family Court on January 9, 2003. In May 2003, Jerry and Carol Haldeman, the children's grandparents, filed a petition requesting to be appointed co-guardians. In October 2003, the Family Court appointed the children's grandparents as co-guardians. The Haldeman family moved and in November 2003, the case was transferred to the department of human services in Washington State.

In April 2004, Duty received instructions from the prosecuting attorney regarding her possible testimony at the criminal case against Joseph Haldeman. The instructions stated that she should not use the words "victim," "molestation," or "CPS." Duty was not called to testify in the criminal case. In June 2004, following a trial, two of the three criminal charges against the father were dismissed and the third resulted in a hung jury. The prosecutor did not retry the father on the remaining count. The family custody proceeding terminated in October 2005, when the family court in Washington State dismissed all proceedings against the parents and returned custody of the children to them.

In May 2004, CPS received a report that Vanessa had been sexually abused by her former foster father, David Kaulia. Duty assigned Nicole Vahia to the case. Duty and Vahia attempted to locate the

Haldeman children for an interview. They were unable to locate the Haldeman children and closed the case because they were unable to locate the alleged victims. Duty and Vahia prepared an Institutional Abuse Investigation Report. Duty attended a case conference regarding the Haldeman children and the allegation against David Kaulia on May 28, 2004. Duty attended two more case conferences, one on May 28, 2005, and the other on June 24, 2005.

On December 28, 2005, Plaintiffs filed a Complaint against Defendants, which was amended on August 31, 2006 ("Amended Complaint"). The Amended Complaint alleges Constitutional violations pursuant to 42 U.S.C. § 1983 and various state law claims. On December 12, 2006, this Court dismissed Denise and Joseph Haldeman's section 1983 claim against Duty on statute of limitations grounds. On February 13, 2007, this Court dismissed Denise and Joseph Haldeman's state law tort claims on the same grounds. Vanessa and Benjamin Haldeman have brought the following claims against Defendant Duty: 1) Fourth and Fourteenth Amendment violations pursuant to 42 U.S.C. § 1983 for unlawful seizure, conducting an improper interview of Vanessa Haldeman, causing Vanessa to undergo an intrusive medical exam, fabricating evidence and coercing and threatening other parties to provide false evidence in Family Court proceedings, due process violations for lack of a pre-deprivation hearing and seizing the children without probable cause or exigent circumstances, and equal protection violations based on fraudulent prosecution

in the Family Court and criminal court, (Count One); 2) conspiracy to violate civil rights pursuant to 42 U.S.C. § 1983 (Count Two); 3) negligence and gross negligence (Counts Four and Five); 4) Defamation (Count Six); 5) intentional infliction of emotional distress ("IIED") (Count Seven); and 6) invasion of privacy (Count Ten).

On December 17, 2007, Defendant Duty filed the instant motion for summary judgment (Doc. # 742). Plaintiffs filed their opposition on February 7, 2008 (Doc. # 801), and Duty filed her reply on February 13, 2008 (Doc. # 805).

STANDARD OF REVIEW

Rule 56 requires summary judgment to be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Porter v. Cal. Dep't of Corrections,* 419 F.3d 885, 891 (9th Cir.2005); *Addisu v. Fred Meyer, Inc.,* 198 F.3d 1130, 1134 (9th Cir.2000). A main purpose of summary judgment is to dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential element at trial. *See id.* at 323. A moving party without the ultimate burden of persuasion at trial-usually, but not always, the defendant-has both the initial burden of production

and the ultimate burden of persuasion on a motion for summary judgment. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir .2000). The burden initially falls upon the moving party to identify for the court those "portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987) (citing *Celotex Corp.*, 477 U.S. at 323).

Once the moving party has carried its burden under Rule 56, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial" and may not rely on the mere allegations in the pleadings. *Porter,* 419 F.3d at 891 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). In setting forth "specific facts," the nonmoving party may not meet its burden on a summary judgment motion by making general references to evidence without page or line numbers. *S. Cal. Gas Co. v. City of Santa Ana,* 336 F.3d 885, 889 (9th Cir.2003); Local Rule 56.1(f) ("When resolving motions for summary judgment, the court shall have no independent duty to search and consider any part of the court record not otherwise referenced in the separate concise statements of the parties."). "[A]t least some 'significant probative evidence' " must be produced. *T.W. Elec. Serv.,* 809 F.2d at 630 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.,* 391 U.S. 253, 290, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968)). "A scintilla of evidence or evidence that is merely colorable or not significantly

probative does not present a genuine issue of material fact." *Addisu,* 198 F.3d at 1134.

When "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." *T.W. Elec. Serv.,* 809 F.2d at 631. In other words, evidence and inferences must be construed in the light most favorable to the nonmoving party. *Porter,* 419 F.3d at 891. The court does not make credibility determinations or weigh conflicting evidence at the summary judgment stage. *Id.* However, inferences may be drawn from underlying facts not in dispute, as well as from disputed facts that the judge is required to resolve in favor of the nonmoving party. *T.W. Elec. Serv.,* 809 F.2d at 631.

DISCUSSION

Duty claims that she is entitled to absolute immunity for any state law claims arising out of her duties and responsibilities that she assumed pursuant to Hawaii Revised Statutes Chapter 587. Duty also argues she is entitled to absolute immunity for the section 1983 claims arising out of her conduct of filing and prosecuting the dependency petition. Duty further asserts that she is entitled to qualified immunity for claims arising out of the manner in which she interviewed Vanessa, the detention of the Haldeman children, and the medical examination of Vanessa. Finally, Duty argues that she is entitled to summary judgment on Plaintiffs' claims of a conspiracy to falsify evidence.

Plaintiffs assert that Duty is not entitled to any immunity and that the following issues preclude summary judgment on their claims: 1) Duty made a decision to seize the Haldeman children before she interviewed the teachers who witnessed Vanessa acing out in a sexualized manner at the preschool; 2) Duty did not attempt to discover whether the teachers had encouraged, reinforced, or shaped Vanessa's behavior; 3) Duty talked to Vanessa at the preschool, but did not interview her at the school; 4) Duty did not ask the preschool teachers these four questions: a) how often the behavior occurred; b) what do the preschool teachers do when the behavior occurs; c) does Vanessa act this way anywhere else; and d) how do the parents respond when informed of her sexualized behavior; 5) no reasonable social worker would have believed that Vanessa was in imminent danger at this point, and there were no emergency or exigent circumstances for removing Vanessa from the preschool; 6) likewise, there were no emergency or exigent circumstances for Duty to instruct Donald Cupp to seize Benjamin; 7) Duty coached Vanessa to talk about "suck" "private part" and "secrets" during the drive to the Center, talked to Vanessa at the Center prior to the interview, and no notes were made of either conversation; 8) Duty is unaware of the research and published studies pertaining to various issues in the arena of interviewing children, such as deception in three- and four-year-old children; 9) during the interview, Duty introduced concepts that did not originate from Vanessa; 10) Duty allowed an off-the-record conversation between Graves and Vanessa, during which Vanessa claims that Graves coached her to use

the words "suck," "private part," "tinkler," and "private touching;" 11) Duty ignored three separate requests by Vanessa to end the interview; 12) Duty's interview process was suggestive and coercive and she should have known it would yield false information; 13) no reasonable investigator would have believed that the children were in danger and continued the seizure of the children; 14) Duty participated in Graves' interview of Benjamin; 15) Benjamin's interview did not corroborate Vanessa's statements of sexual abuse by her father; 16) no reasonable social worker would have continued the seizure of the children; 17) Duty met and conspired with the other defendants during the criminal-civil coordination meetings in 2002 to 2003 and conspired to continue to present fabricated evidence.

I. State Law Claims, Counts Four, Five, Seven, and Ten

Duty argues that all of Plaintiffs' allegations used to support their state law claims of negligence, gross negligence, IIED, and invasion of privacy[3] involve her duties as a supervisor in the Child Welfare Services Branch of the Social Services Division of the State of Hawaii. Defendant Duty asserts that all of her actions were taken under Chapter 587 proceedings, and thus, she is absolutely immune from being sued pursuant to Hawaii Revised Statute § 350-3.

Hawaii Revised Statute § 350-3 provides that "[a]ny individual who assumes a duty or responsibility pursuant to section 350-2 or chapter

[3] Duty has not moved to dismiss Plaintiffs' defamation claim.

587 shall have immunity from civil liability for acts or omissions performed within the scope of the individual's duty or responsibility." Haw. Rev. Stat. § 350-3(b). Chapter 587 establishes a comprehensive plan for the protection of children who have been abused or neglected, by investigating complaints of abuse, removing children from their parents' custody, placing children in foster care, and initiating further action in the Family Court, when warranted. *See* Haw. Rev. Stat. § 587-21. The issue thus, is whether Defendant Duty was acting within the scope of her duties when she allegedly committed the state law torts at issue.

As stated in this Court's Order Granting in Part and Denying in Part Defendant Forbes' (fka Acero) Motion to Dismiss this case, employment cases regarding respondeat superior liability for an employer where an employee acting within the scope of employment commits a tort are helpful to this analysis.[4] To determine whether a tort was committed within the scope of an employee's employment under Hawaii law, Hawaii courts follow

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[4] This Court is cognizant of the fact that the scope of employment cases and Restatement of Agency approach this issue from the standpoint of liability of the employer, rather than through a lens of qualified immunity for the individual employee's acts. However, this Court finds such cases to be instructive, because the Hawaii Revised Statute at issue clearly states that the scope of employment is the pertinent question, and does not follow the line of cases regarding qualified immunity under 42 U.S.C. § 1983. This Court is also cognizant of the fact that, in this case, the employer, DHS and CPS, have been dismissed because as State agencies, they are absolutely immune from suit pursuant to the Eleventh Amendment.

the Restatement of Agency § 228, which provides that:

> (1) Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits; [and]
>
> (c) it is actuated, at least in part, by a purpose to serve the master[.] ...
>
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Wong Leong v. Hawaiian Indep. Refinery, Inc., 76 Hawai'i 433, 879 P.2d 538, 543 (Haw.1994). "In determining the scope of employment, the applicable test is whether the employee's conduct was related to the employment enterprise or if the enterprise derived any benefit from the activity." *Id.* at 546.

The Restatement of Agency section 229 provides that "[t]o be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized." Restatement of Agency 2d § 229 (1958). The comments provide that

> a servant is authorized to do anything which is reasonably regarded as

> incidental to the work specifically directed or which is usually done in connection with such work ... [a]lthough an act is a means of accomplishing an authorized result, it may be done in so outrageous or whimsical a manner that it is not within the scope of employment.

Restatement § 229 comments a and b. Following the Restatement, the Hawaii Supreme Court has noted that an act, "although forbidden, or done in a forbidden manner, may be within the scope of employment ... the ultimate question is whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business [.]" *State v. Hoshijo ex rel. White,* 102 Hawai'i 307, 76 P.3d 550, 563 n. 29 (Haw.2003) (finding that the actions of a student manager of the state university basketball team in shouting racial slurs at a spectator at a basketball game was conduct within scope of employment because he was required to attend games, work on the bench, assist the team, it was foreseeable that he would interact with the public at games, and the handbook proscribed use of obscene or inappropriate language to spectators).

Hawaii Revised Statute section 587-21 provides:

> (a) Upon receiving a report that a child is subject to imminent harm, has been harmed, or is subject to threatened harm, the department shall cause such investigation to be made as it deems to

be appropriate. In conducting the investigation the department may:

> (1) Enlist the cooperation of appropriate law enforcement authorities for phases of the investigation for which they are better equipped ...; and
>
> (2) Interview a child who is the subject of an investigation without the prior approval of and without the presence of the child's family, including temporarily assuming protective custody of the child for the purpose of conducting the interview, if the action is deemed necessary and appropriate under the circumstances by the department and a police officer.

(b) Upon satisfying itself as to the course of action that should be pursued to best accord with the purpose of this chapter, the department shall: ...

> (3) Assume temporary foster custody of the child pursuant to section 587-24(a) and file a petition with the court under this chapter within three working days ... after the date of the department's assumption of temporary foster custody of the child ...

It is undisputed that Duty was assigned these responsibilities with respect to the Haldeman children. Thus, clearly, acts or omissions allegedly committed by Duty while investigating the report of possible abuse by speaking with the preschool teachers (or failing to do so), receiving custody of Vanessa from Detective Graves, talking to Vanessa at the preschool and at the Center, interviewing Vanessa, and attending Benjamin's interview, are acts within the scope of her duties. Certainly, as the assigned case worker, Defendant Duty was employed to perform such acts, each of those alleged acts occurred within her work time and space, and were performed to serve her employer.

The investigation at the preschool included an interview of one teacher and the director, both of whom directly witnessed the recent allegation made by Vanessa, and included a review of the notebook, which contained written reports of Vanessa acting in a sexualized manner. This information was certainly sufficient to bring Vanessa in for an interview. Plaintiffs have pointed to no policy or DHS guideline that was violated by not interviewing the teachers who personally witnessed the earlier sexualized conduct by Vanessa, or by not asking whether Vanessa engaged in such conduct outside of school. Indeed, there is no indication that any teachers at the school would know whether Vanessa engaged in such conduct outside of school. Even if some teachers had been aware that Vanessa did not do so, it would not discount the story Vanessa had told to Golden and Hayashi or her previous documented sexualized

conduct. Furthermore, although Plaintiffs produced expert reports stating that the preschool had reinforced Vanessa's sexualized behavior by responding to it by letting her get special attention and play time in the Director's office, such information, if true, does not make Vanessa's statements that her daddy had shown her his tinkler, he had sucked on her private areas, and asked her to suck on his private areas, less concerning. Moreover, in the background section of the expert report by Wakefield, Wakefield states only that Vanessa reported that her father showed her his penis, and it does not acknowledge that Vanessa stated that he had sucked on her private parts and asked her to suck his private area. Indeed, it is possible that Duty could have breached her duties had she not brought Vanessa and Benjamin in for interviews. *See Williamson v. Basco,* No. 06-00012, 2007 WL 4570496, at *6-7 (D.Haw. Dec.31, 2007) (finding that Defendant Asato was entitled to immunity pursuant to HRS § 350-3 with respect to the plaintiff's IIED claim because all of the plaintiff's claims against Asato, including the claim that Asato failed to talk to the children's teachers, arose out of the performance of his duties of investigating child abuse as a Child Protective Services employee).

The allegations of "coaching" Vanessa in the car and misconduct during the interview of Vanessa by introducing certain concepts, placing the earpiece in her ear during an unrecorded session, and continuing the interview despite Vanessa's requests to stop, amount to at most negligence. Plaintiffs have produced no evidence that such conduct was

intentional or so outrageous as to no longer be considered conduct serving the purposes of the employer. Plaintiffs have produced no evidence to show that any of the above conduct was outside of the normal risks to be borne by DHS or CPS, or were outside of the same general nature as that authorized, or incidental to the conduct authorized. Indeed, Duty testified in Family Court that the philosophy at the Children's Justice Center is there are no secrets and it happens quite frequently that they let a child listen through the earpiece. There is no indication that CPS instructed Duty to conduct interviews in a certain fashion, or as set forth by Plaintiffs' experts, and that Duty breached that duty during the interview. Neither is there any evidence that Duty had a personal motive or intent to conduct a coercive interview. *See Luna v. Meinke*, 844 F. Supp. 1284, 1287-88 (N.D. Ill. 1994) ("An agent ... is deemed to have acted outside the scope of his or her employment if the employee commits certain acts 'that could not possibly be interpreted as the merely overzealous or ill-judged performance of his duties as agent.' ") (citation omitted).

However, there are genuine issues of fact of whether the following conduct by Duty was within the scope of her employment: 1) deciding to assume temporary foster custody of both Vanessa and Benjamin, without having interviewed their mother, Denise Haldeman, in apparent contradiction to DHS guidelines; 2) approving claims that Benjamin had corroborated Vanessa's statements of abuse in the Family Court filings, when in fact he had not corroborated inappropriate physical touching, and/or

making material omissions in such filings; 3) allegedly conspiring with Cupp to continue making such claims of corroboration; and 4) allowing an intrusive medical exam to be performed on Vanessa without prior consent of her at least her mother or a court order, or having interviewed her mother.[5] *See Wong-Leong*, 879 P.2d at 543 ("Whether an employee is acting within the scope of his or her employment is ordinarily a question of fact to be determined in light of the evidence of the particular case."). Indeed, it is possible that CPS would claim that social workers are not expected to engage in such conduct and that such conduct is not foreseeable. *See Grozdanich v. Leisure Hills Health Ctr., Inc.*, 25 F.Supp.2d 953, 979 (D. Minn. 1998) ("Naturally, the more outrageous the employee's tortious act should be, the less likely it could be described as foreseeable, and the less likely that the employer could be required to assume responsibility for the act, as a general risk of the employer's business."). This holding is supported by the legislative history of Hawaii Revised Statute 350-3. The committee reports state that the committee believed that immunity for child protective services' social workers was necessary "as long as they act responsibly in the performance of their duties." 1986 Senate Journal, Stand. Comm. Rep. No. 597.

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[5] Duty states that Graves ordered the medical exam. However, based on Duty's own understanding of the DHS guidelines, she had authority to order such exam, but she should have first interviewed at least Denise Haldeman before doing so. Thus, there is a question of fact of whether Duty had authority to overrule Graves's decision, or whether her approval was necessary.

Therefore, Duty is entitled to immunity on the state law claims for only some of her actions, as outlined above.

II. Section 1983 Claims, Counts One and Two

A. Absolute Immunity

Defendant Duty argues that she is entitled to absolute immunity as to Plaintiffs' claims pursuant to 42 U.S.C. section 1983 arising out of the filing and prosecution of the petition in Family Court, and her alleged failure to explore exculpatory evidence, because she was performing a quasi-judicial function, akin to a prosecutor, in that role.

The United States Supreme Court has recognized absolute immunity from suit alleging violations of 42 U.S.C. § 1983 for a variety of persons who perform functions that are integral to the judicial process. *See Briscoe v. LaHue,* 460 U.S. 325, 342, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983). Absolute judicial immunity protects such persons "from any damage action in the performance of their duties. Under this theory, absolute immunity precludes the imposition of any liability on the alleged wrongdoers, regardless of how wrongful that person's conduct may have been." *Seibel v. Kemble,* 63 Haw. 516, 631 P.2d 173, 177 (Haw.1981). However, "the presumption is that qualified rather than absolute immunity is sufficient ... and [the Supreme Court] [has] been quite sparing in [their] recognition of absolute immunity." *Burns v. Reed,* 500 U.S. 478, 486-478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991). The party asserting entitlement to absolute immunity, in this case, Duty, bears the burden of establishing the justification for such

immunity. *Antoine v. Byers & Anderson, Inc.*, 408 U.S. 429, 433 (1993).

Whether a person is entitled to absolute immunity is not analyzed merely by their position title, but instead rests on the type of function that they are perform[illegible]. *Briscoe*, 460 U.S. at 342 n. 28 (citing *Imbler v. Pachtman*, 424 U.S. 409, 430-431, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (reserving the question whether a prosecutor, who is absolutely immune for decisions to initiate a prosecution or put witnesses on the stand, has similar immunity for administrative or investigative tasks) and *Hampton v. City of Chicago*, 484 F.2d 602, 608 (7th Cir.1973) (prosecutor's immunity ceases when he acts in a capacity other than his quasi-judicial role)); *see also Doe v. Lebbos*, 348 F.3d 820, 825 (9th Cir.2003) (looking at the "nature of the function performed, not the identity of the actor who performed it.") (citation omitted) *overruled on other grounds by Beltran v. Santa Clara*, --- F.3d ----, No. 05-16976, 514 F.3d 906, 2008 WL 193319, at *2 (9th Cir. Jan.24, 2008).

With respect to social workers, the Ninth Circuit has held that "social workers are entitled to absolute immunity in performing quasi-prosecutorial functions connected with the initiation and pursuit of child dependency proceedings." *Meyers v. Contra Costa County Dept. of Social Servs.*, 812 F.2d 1154, 1157 (9th Cir.1987). This is because, like a prosecutor,

> [t]he social worker must make a quick decision based on perhaps incomplete information as to whether to commence investigations and initiate proceedings

> against parents who may have abused their children. The social worker's independence, like that of a prosecutor, would be compromised were the social worker constantly in fear that a mistake could result in a time-consuming and financially devastating civil suit.

Id.

In *Doe v. Lebbos,* relied upon by Duty, the plaintiffs contended that the social worker violated their constitutional rights by removing Lacey, a four-year-old girl, from her father's custody, inadequately investigating allegations of abuse and neglect, fabricating evidence in support of the dependency petitions, and referring Lacey for a sexual abuse examination without parental consent or a court order. 348 F.3d at 822-23. The Ninth Circuit found that the social worker was entitled to absolute immunity for allegedly failing to investigate adequately the allegations of abuse and neglect and for allegedly fabricating evidence in the dependency petitions she prepared for the court since such actions were part of the initiation and pursuit of child dependency proceedings. *Id.* at 826. Furthermore, the Ninth Circuit held that "as prosecutors and others investigating criminal matters have no absolute immunity for their investigatory conduct, a fortiori, social workers conducting investigations have no such immunity." *Id.; see also Broam v. Bogan,* 320 F.3d 1023, 1028 (9th Cir. 2003) (finding that because the social worker was primarily acting as an investigator

rather than an advocate, he was not entitled to absolute immunity).

The Ninth Circuit recently overruled that decision in part and held that although social workers have absolute immunity when they make decisions to institute dependency proceedings " *they are not entitled to absolute immunity from claims that they fabricated evidence during an investigation or made false statements in a dependency petition* affidavit that they signed under penalty of perjury, because such actions aren't similar to discretionary decisions about whether to prosecute." *Beltran,* --- F3. ----, 514 F.3d 906, 2008 WL 193319, at * 1 (emphasis added).

Here, Plaintiffs claim that Cupp and Duty fabricated evidence that Benjamin had corroborated Vanessa's allegations of sexual abuse and that Duty misrepresented and omitted important parts of the interviews in the Family Court proceedings. As set forth above, this type of conduct, if true, is not subject to absolute immunity. Likewise, Duty's conduct in investigating the situation, including an alleged failure to explore exculpatory evidence, is not entitled to absolute immunity. Accordingly, Duty's argument fails, she is not entitled to absolute immunity for filing the petition since such filing included false statements.

B. Qualified Immunity

Duty argues that she is entitled to qualified immunity for claims arising out her method of conducting the investigation, detention of the Haldeman children, and the medical examination conducted on Vanessa.

"To establish that a state official is personally liable in an action under 42 U.S.C. § 1983, a plaintiff must show that 'the official, acting under color of state law, caused the deprivation of a federal right.'" *Spoklie v. Montana,* 411 F.3d 1051, 1060 (9th Cir.2005) (quoting *Hafer v. Melo,* 502 U.S. 21, 25, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991)). As long as the official's "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," he or she has qualified immunity from civil liability under § 1983. *Id.* The following must be determined in the analysis of a qualified immunity defense: "(1) what right has been violated; (2) whether that right was so 'clearly established' at the time of the incident that a reasonable officer would have been aware of its constitutionality; and (3) whether a reasonable public officer could have believed that the alleged conduct was lawful." *Jensen v. City of Oxnard,* 145 F.3d 1078, 1085 (9th Cir.1998), *cert. denied,* 525 U.S. 1016, 119 S.Ct. 540, 142 L.Ed.2d 449 (1998). "A particular right is 'clearly established' if the 'contours of [that] right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.; see also Devereaux v. Abbey,* 263 F.3d 1070, 1074 (9th Cir.2001) ("In essence, at the first step, the inquiry is whether the facts alleged constitute a violation of the plaintiff's rights. If they do, then, at the second step, the question is whether the defendant could nonetheless have reasonably but erroneously believed that his or her conduct did not violate the plaintiff's rights.") (citing *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). The party asserting

qualified immunity bears the burden of proving that the defense applies. *Benigni v. City of Hemet,* 879 F.2d 473, 479 (9th Cir.1988).

Duty asserts that Plaintiffs' claims fail because there is no constitutional right to have a interview of an alleged child-abuse victim conducted in a particular manner. The Ninth Circuit has held that

> there is no constitutional due process right to have child witnesses in a child sexual abuse investigation interviewed in a particular manner, or to have the investigation carried out in a particular way. Interviewers of child witnesses of suspected sexual abuse must be given some latitude in determining when to credit witnesses' denials and when to discount them, and we are not aware of any federal law-constitutional, decisional, or statutory-that indicates precisely where the line must be drawn. Consequently, mere allegations that Defendants used interviewing techniques that were in some sense improper, or that violated state regulations, without more, cannot serve as the basis for a claim under § 1983.

Devereaux, 263 F.3d at 1075 (9th Cir.2001) (citations omitted).

However, there is a well established liberty interest of parents in the custody of their children. *See Campbell v. Burt,* 949 F. Supp. 1461, 1466 (D. Haw. 1996). "There are few rights more fundamental

in and to our society than those of parents to retain custody over and care for their children, and to rear their children as they deem appropriate." *Id.* (citation and internal quotation marks omitted). Indeed, the Ninth Circuit recently held that

> [p]arents and children have a well-elaborated constitutional right to live together without governmental interference. The Fourteenth Amendment guarantees that parents will not be separated from their children without due process of law except in emergencies. Officials violate this right if they remove a child from the home absent information at the time of the seizure that establishes reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury. The Fourth Amendment also protects children from removal from their homes absent such a showing.

Rogers v. County of San Joaquin, 487 F.3d 1288, 1294 (9th Cir.2007) (citations and internal quotation marks omitted).

Thus, this Court must first determine whether there was reasonable cause to believe at the time of the initial seizure of each child, the time of the medical exam search of Vanessa, and at the time the decision was made to continue seizure of both children by transferring them to foster care, that

both Vanessa and Benjamin were in imminent danger of serious bodily injury. If there was reasonable cause at each of these steps, this Court must determine whether the scope of each intrusion was reasonably necessary to avert that specific injury.

In addition, "there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government ." *Devereaux*, 263 F.3d at 1074-75. Where the false evidence comes only from one interview of a child, the plaintiff must,

> at a minimum, point to evidence that supports at least one of the following two propositions: (1) Defendants continued their investigation of [the alleged perpetrator] despite the fact that they knew or should have known that he was innocent; or (2) Defendants used investigative techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false information.

Id. at 1076.

This Court must review what Duty was aware of at each important step in the case and whether her actions were based on reasonable cause. First, it is clear to this Court that at the time of the initial seizure of both children from the schools, Duty had reasonable cause to believe that Vanessa and

Benjamin were in imminent danger of serious bodily injury, and that the scope of the intrusion, an interview of each child, was reasonably necessary to avert any further possible sexual molestation. Thus, Duty has qualified immunity for the initial seizures and interviews of the two children.

The allegations pertaining to conduct engaged in by Duty during the interview of Vanessa do not change the fact that Duty had reasonable cause to initially seize Vanessa and Benjamin and interview them. That conduct does, however, shed light on whether it was reasonable for Duty to continue the seizure of both children after the interviews, and subject Vanessa to a medical exam, without a court order.

> [o]fficials, including social workers, who remove a child from its home without a warrant must have reasonable cause to believe that the child is likely to experience serious bodily harm in the time that would be required to obtain a warrant. Serious allegations of abuse that have been investigated and corroborated usually give rise to a reasonable inference of imminent danger sufficient to justify taking children into temporary custody if they might again be beaten or molested during the time it would take to get a warrant.

Rogers, 487 F.3d at 1294-95 (citations and internal quotation marks omitted).

Here, Vanessa's allegations constitute allegations of imminent serious bodily injury. However, there are questions of fact of whether these allegations were properly investigated and corroborated prior to continuing the seizure of both children and ordering a medical exam of Vanessa without a court order, and whether it was reasonable to believe that both Benjamin and Vanessa would likely experience serious bodily harm in the time that would be required to obtain a warrant. Although the words used by Vanessa during the interview mirrored what she had reported to the preschool staff, Vanessa alleges that Duty coached her prior to the interview by repeating these words to her. Also, although Vanessa provided statements of molestation during her interview prior to Duty placing the earpiece in her ear and prior to Vanessa stating that she was tired and wanted the interview to be over, Plaintiffs produced expert reports stating that introducing certain concepts, using affirmations, ignoring fantasy facts, and entering the interview without knowledge of the child's background and with a bias, violate established guidelines that are well known in the field, and lead to a suggestive interview with coerced and inaccurate responses. Duty has not, at this stage, contested the credentials of these experts or their opinions. Duty argues only that this Court is free to disregard them. Although this may be true, this Court finds that these expert reports create a genuine issue of fact as to whether Duty's interview of Vanessa was so suggestive that Duty should have known it would lead to false responses.

Furthermore, Duty does not address why both children were likely to experience serious bodily harm in the time that would be required to obtain a warrant. The children were seized on a weekday during school hours and the interviews of the children were not lengthy. Therefore, it is possible that the courts were open and Duty could have attempted to obtain a warrant for the medical exam of Vanessa and the continued seizure of the children before the end of the day and before the children would be sent home to their parents.

In addition, it is questionable whether a reasonable social worker would have made the decision to place both children into temporary custody prior to interviewing the non-offending parent, when there is no other corroboration of abuse. Likewise, there is a question of fact of whether there was reasonable cause to file a petition in Family Court. It is unclear whether the Family Court would have granted temporary custody of both Benjamin and Vanessa if it had been explained to the court that the important parts of the four-year-old's statements were not corroborated, and the decision was made to place the children in foster care prior to attempting to interview the non-offending parent.

With respect to the claims against Duty for the medical examination, Duty argues that Graves ordered the exam, and therefore, Plaintiffs cannot prove that she had the requisite personal participation. *See Jones v. Williams*, 297 F.3d 930, 934 (9th Cir.2002) ("In order for a person acting under color of state law to be liable under section

1983 there must be a showing of personal participation in the alleged rights deprivation.").

Although this may be true, Plaintiffs have produced evidence that Duty had authority to order such exam and Duty has not explained if she approved of the exam, or if she could have at least delayed it until she got a court order, parental consent, or continued the investigation. Furthermore, Duty claims that such exam was reasonable because Vanessa's statements had been corroborated by her brother. However, as set forth above, there is a question of fact of whether Duty should have known of his lack of corroboration either because she watched the interview, or because she was Cupp's supervisor and thus, his knowledge is imputed to her.

Likewise, there is a question of fact of whether Duty conspired with Cupp to produce fabricated evidence. Duty argues that the conspiracy claim applies only to being charged with a crime and therefore, does not apply in this context. However, making false statements in a dependency petition with the intent that the court rely on it, causing the parents to temporarily lose custody, seriously infringes on a parent's constitutional rights. *See Beltran*, 514 F.3d 906, 2008 WL 193319, at * 1 (no absolute immunity where a social worker "fabricated evidence during an investigation or made false statements in a dependency petition affidavit."). Although Duty does not recall attending meetings, Plaintiffs presented documents showing that she was expected to attend such meetings and that Cupp was to be present also. In addition, it is undisputed that

Duty eventually approved the petition filed in the Family Court, which appears to have material misstatements of fact. Therefore, Plaintiffs' conspiracy claim survives this summary judgment motion.

CONCLUSION

For the reasons stated above, this Court GRANTS IN PART AND DENIES IN PART Defendant Duty's Motion for Summary Judgment. Duty is entitled to immunity on the state law tort claims for only some of her conduct. Likewise, Duty is entitled to qualified immunity on the federal claims brought pursuant to 42 U.S.C. § 1983 as to only some of her conduct. With respect to the conspiracy claim, Plaintiff has presented enough facts to survive summary judgment based on an alleged conspiracy between Duty and Cupp to present fabricated evidence to Family Court.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, February 27, 2008

/s/ David Alan Ezra, United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

[Filed Apr. 15, 2008]

VANESSA HALDEMAN & BENJAMIN HALDEMAN, BY THEIR PARENTS AS NEXT FRIENDS; JOSEPH & DENISE HALDEMAN;JOSEPH HALDEMAN,individually; DENISE HALDEMAN, individually; JERRY HALDEMAN, individually; & CAROL HALDEMAN, individually, Plaintiffs, v. RUTH GOLDEN, in her individual capacity; PATRICIA NAVARRO, in her individual capacity; CAROLINE HAYASHI, in her individual capacity; CYNTHIA NOEL, in her individual capacity; UNIVERSITY OF NATIONS PRE-SCHOOL, a Private Agency; THE UNIVERSITY OF NATIONS as Respondeat Superior; ALEXANDER	CV No. 05-CV-00810-DAE-KSC

GRAVES, in his individual capacity; COUNTY OF HAWAII, a municipal entity; KAREN DUTY, in her individual capacity; DONALD CUPP, in his individual capacity; JILL ACERO, in her individual capacity; BOBBETTE STRAUSS, in her individual capacity; CHILD PROTECTIVE SERVICES, an agency of the Department of Human Services; DEPARTMENT OF HUMAN SERVICES [DHS], State of Hawaii; LILLIAN KOLLER, Director of DHS, in her official capacity; ANDREA MCCOLLUM, in her individual and professional capacity; LEGAL AID SOCIETY OF HAWAII, a Private Non-Profit Agency; DAVID KAULIA, in his individual capacity; COLLEEN CLARK, in her individual and professional capacity; CHILD AND FAMILY SERVICE, a Private Non-Profit Agency; Jointly and Severally, Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT DONALD CUPP'S MOTION FOR SUMMARY JUDGMENT

DAVID ALAN EZRA, District Judge.

The Court heard the Defendant Donald Cupp's motion on April 14, 2008. (Doc. # 778). William Deeley, Esq., and John Winnicki, Esq., appeared at the hearing on behalf of Plaintiffs; Julie A. Passa, Deputy Attorney General, appeared at the hearing on behalf of Defendant Donald Cupp; John R. Molay, Deputy Attorney General, appeared at the hearing on behalf of Defendant Karen Duty; Joseph K. Kamelamela, Deputy Corporation Counsel, appeared at the hearing on behalf of Defendant Alexander Graves and the County of Hawaii; E. Mason Martin, III, Esq., appeared at the hearing on behalf of Defendants Ruth Golden, Patricia Navarro, Caroline Hayashi, Cynthia Noel, University of Nations Pre-School, and The University of the Nations; and John P. Gillmor and Ryan S. Endo, Deputy Attorneys General, appeared at the hearing on behalf of Defendant Jill Acero; April Luria, Esq., appeared at the hearing on behalf of Defendants Child and Family Service ("CFS") and Colleen Clark; and William J. Nagle, Esq., appeared at the hearing on behalf of Defendants Bobbette Strauss and the Institute for Family Enrichment. After reviewing the motion and the supporting and opposing memoranda, the Court GRANTS IN PART AND DENIES IN PART Defendant Donald Cupp's Motion for Summary Judgment. Cupp is entitled to immunity on the state law tort claims for only some

of his conduct. Likewise, Cupp is entitled to qualified immunity on the federal claims brought pursuant to 42 U.S.C. § 1983 as to only some of his conduct. With respect to the conspiracy claim, Plaintiffs have presented enough facts to survive summary judgment based on an alleged conspiracy between Defendants Karen Duty and Cupp to present fabricated evidence to Family Court.

BACKGROUND

In 2002, Defendant Donald Cupp was employed as a licensed social worker in the Child Protective Services Branch of the Social Services Division of the State of Hawaii Department of Human Services ("DHS") in Kailua-Kona, Hawaii. Cupp has an Associates Degree in Human Services from Honolulu Community College, a Bachelor of Science degree in Recreation from the University of Hawaii, and a Masters of Social Work degree from the University of Hawaii.

Many of the facts of this case are set forth in detail in this Court's Order Granting in Part and Denying in Part Defendant Karen Duty's Motion for Summary Judgment ("Duty Order") (Doc. # 817), some of which are repeated herein. In 2002, then four-year-old Vanessa Haldeman attended preschool at the University of Nations Preschool, where beginning in May 2002, she started engaging in sexualized behavior. For example, on separate occasions, she exposed her private area to a boy, pulled down her underpants, and asked a young boy to touch her private area. Defendant Director Ruth Golden of the University of Nations Preschool contacted Child Protective Services of the State of

Hawaii's Department of Human Services ("CPS") on July 17, 2002, regarding Vanessa's conduct. CPS did not start an investigation.

On October 23, 2002, after a few other occasions of sexualized conduct by Vanessa, her teacher, Carol Hayashi, came into Golden's office with Vanessa and Vanessa repeated that her daddy had shown her his tinkler, he had sucked on her private areas, and asked her to suck on his private areas. She also told Golden and Hayashi that her mommy tells her to stay away from daddy and not to talk about it because it is "potty talk." Golden made notes of this conversation and contacted CPS that day.

On October 24, 2002, Defendant social worker Karen Duty and Defendant former Hawaii Police Detective Alexander Graves, went to the preschool and met with Golden and Hayashi. Golden and Hayashi informed Duty and Graves of Vanessa's sexualized conduct and statements about her father. Based on this information, Detective Graves took Vanessa into custody and transferred custody to Duty. By directive from Duty, Defendant Donald Cupp went to pick up Vanessa's brother, Benjamin Haldeman, from his school. Benjamin was eight years old at this time. Duty had told Cupp that there was a concern that Vanessa was being sexually molested by their father and that their mother was not being protective.

Duty interviewed Vanessa at the Children's Justice Center (the "Center"), and Cupp and Graves observed the interview from another room. The interview was video taped. The interview is summarized in the Duty Order.

Benjamin Haldeman was then interviewed by Detective Graves. A review of Benjamin's interview shows that he told Detective Graves that: 1) everything is fine at home, 2) hugs, pats, and kisses occur at home, 3) only bad touching at home is spankings, 4) there is no private touching other than being helped by his parents with cleaning his private areas in the bathtub, 5) he bathes with Vanessa, and sometimes his mom or his dad, 6) there is no private touching between he and Vanessa, 7) he does not see private touching with anyone else in the home, 8) Vanessa talks about private touching to their mom during the bath and after the bath, for example, Vanessa takes her clothes off and "she plays with her business" and "talks gross talk" "like look at my butt," 9) he has never seen his father engage in private touching with Vanessa, 10)Vanessa has never told him about their father doing private touching, 11) he has helped Vanessa clean herself sometimes, 12) he only touched her private areas when he walked on her butt when he got mad at her, 13) Vanessa once lifted up his private parts, she was just playing, and he asked her to stop it and said that is gross, and she would not stop, 14) he has not seen Vanessa touch anyone else's private parts, 15) the term "potty talk" means gross stuff like "butt head, butt face, butt ears," 16) he and Vanessa use "potty talk," but his mom and dad do not use "potty talk," 17) his dad uses the word tinkler, his mom uses the word penis, he taught Vanessa to say weiner, but he normally calls it tinkler, 18) he has heard his sister talk about a tinkler, 19) he has a good house, 20) sometimes at home he feels uncomfortable when he has to put wart medicine on

his warts, 21) he and his sister and mom saw an email that had naked pictures of adults on the computer and his mom said do not look at the pictures and she tried to change the email address and get the pictures off of the computer, 22) his dad walks around naked, and 23) his dad does not care if the family sees his private parts when he is getting dressed because they are all family.

Cupp observed Benjamin's interview. There is a question of fact of whether Duty also observed the interview. According to Duty, she does not recall attending the interview, but does recall Cupp informing her that Benjamin stated the following: he was aware that his father touched Vanessa on her private parts, Vanessa had told their mother and she advised Vanessa not to discuss it any further, Vanessa told Benjamin that their father had shaken his tinkler over her, Vanessa and Benjamin take baths and showers together, their father walks around with his private parts showing, and Vanessa would play with Benjamin's private parts even after he asked her to stop. Some of these alleged statements, however, were not actually made by Benjamin in the interview.

Detective Graves requested that a sexual assault nurse examiner conduct a colposcopic genital exam of Vanessa. There was no court order or parental consent for this examination. The exam was conducted at approximately 3:30 p.m. No injuries were found to Vanessa's genitalia and her hymen was found intact. However, the nurse noted in her report that such a finding did not rule out sexual abuse.

Based upon the information provided by the staff at the preschool, Vanessa's interview statements, and Benjamin's interview statements, Cupp, in consultation with Duty, concluded that Vanessa had been sexually abused by her father. Duty approved Cupp's decision to assume temporary foster custody of the children and file a petition with the Family Court. According to Duty, DHS Guidelines require an immediate face-to-face contact with an alleged child victim to assess safety. This includes interviewing the child victim, interviewing siblings, the non-offending parent, and the alleged offender, and a medical exam if it was warranted, and then make a determination for the family. Despite these guidelines, neither Duty nor Cupp called or talked to the children's mother, Denise Haldeman, prior to making the determination that Vanessa had been sexually molested by her father. Cupp continued to work on the Haldeman case until it was transferred into a different DHS unit in mid-November 2002, where Defendant Jill Acero was assigned as case manager.

At approximately 6:00 p.m. on the day of the interviews, Cupp informed the parents that their children were in the custody of CPS and that Vanessa had accused her father, Joseph Haldeman, of sexual molestation, and CPS had confirmed the abuse and that Denise had failed to protect Vanessa. On October 25, 2002, Joseph and Denise Haldeman met with Cupp. Cupp again stated that Vanessa had disclosed, and CPS confirmed, sexual abuse by Joseph and that Denise had failed to protect her. Cupp asked the parents to cooperate and enter into a

Family Service Plan, which included for Joseph an admission to being a child sex abuser, enrollment in sex offender treatment, taking parenting classes, and submitting to a psychological evaluation, among other things, and for Denise, an admission to failing to protect Vanessa, various therapy sessions, and parenting classes and treatment. The Haldeman parents stated that they believed the process was unfair, that they wished CPS would have talked to them, and that they would sue Cupp, CPS, and the preschool.

On October 29, 2002, CPS/DHS filed a Petition for Temporary Custody in the Family Court of the Third Circuit. In the Petition filed with the Family Court, signed by Cupp and Duty,[1] Cupp stated that Benjamin stated in his interview that Vanessa told him about her "secret" about the private touching, and that when Vanessa told their mother about the secret, their mother told Vanessa that it is "potty talk." As set forth above, this Court has reviewed the transcript of Benjamin's interview and does not find these statements present in the transcript of the interview. Cupp further stated that DHS had confirmed sex abuse of Vanessa by her father and threatened harm of Benjamin and Vanessa by their parents. Other than the interviews of the children mentioned above, Cupp did not explain the basis for this statement. Cupp stated that Denise and Joseph Haldeman had retained an attorney who advised them not to talk to CPS and that they refused to be interviewed. Cupp did not explain that CPS had

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[1] The Family Court filings were signed by another employee, on behalf of Duty.

made its decision and tried to implement the Family Service Plan without having previously interviewed the parents. Cupp also filed a Safe Family Home Report in the Family Court. The report again provides that Benjamin stated that Vanessa told their mother her secret about the private touching and their mother said that is "potty talk" and to stop it. Cupp also stated that Benjamin confirmed that his sister told him that their father had shaken his tinkler over her. Again, this Court cannot find anywhere in the transcript of Benjamin's interview where he stated that Vanessa told him their father shakes his tinkler over her. In addition, Cupp did not provide the court with information that Vanessa made numerous statements in her interview that were obviously false.

The Family Court held a hearing on the petition on October 31, 2002. Cupp testified at the Family Court hearing. On December 12, 2002, the Family Court issued an order awarding temporary foster custody of the children, effective October 31, 2002. The order states that DHS shall provide videotapes of the interviews of the children to the parents no later than November 8, 2002, and that there will be a contested adjudication hearing on December 27, 2002. Neither party has indicated to this Court whether Cupp was cross-examined at the hearing, whether the Family Court reviewed the interview videotapes or read the transcripts prior to making the custody decision, or if the Family Court relied mainly on Cupp's version of Benjamin's interview.

In November 2002, Joseph Haldeman underwent a polygraph lie detector test during which he was

directly questioned as to whether he had specifically put his mouth on Vanessa's vaginal area, or his penis in her mouth and other such questions based on Vanessa's allegations. Joseph denied all of Vanessa's allegations and the polygraph examiner found him to be truthful.

Cupp was expected to attend a case conference meeting concerning the Haldeman family on December 12, 2002, where various persons involved, including Graves and Duty, would discuss their up-to-date involvement in the case. Cupp was also expected to attend a case conference in early April 2003 and on May 5, 2003. Duty does not recall actually attending these meetings.

Joseph Haldeman was indicted on August 14, 2003, for sexual assault of a child in the first degree, sexual assault of a child in the third degree, and promoting child abuse in the first degree through producing pornographic material of a child. Approximately three weeks later, the prosecution made a motion to withdraw the charge of sexual assault in the first degree. On September 15, 2003, the Circuit Court of the Third Circuit for the State of Hawaii approved the prosecution's withdrawal of the charge of sexual assault in the first degree. A jury trial was held approximately eight months later, in May 2004, on the remaining two counts. After the prosecution had presented its case-in-chief, but prior to the presentation of a defense, the court granted Joseph Haldeman's motion for judgment of acquittal on the charge of sexual assault in the third degree and Joseph Haldeman was so acquitted. The charge of child pornography resulted in a mistrial. On

September 3, 2004, the court granted Joseph Haldeman's motion to dismiss that charge based upon the mistrial and prosecutor's failure to file for retrial of that charge.

In May 2004, Cupp received instructions from the prosecuting attorney regarding his possible testimony at the criminal case against Joseph Haldeman. The instructions, which were also given to Duty, stated that he should not use the words "victim," "molestation," or "CPS." Neither Cupp nor Duty were called to testify in the criminal case.

The family custody proceeding terminated in October 2005, when the family court in Washington State dismissed all proceedings against the parents and returned custody of the children to them.

On December 28, 2005, Plaintiffs filed a Complaint against Defendants, which was amended on August 31, 2006 ("Amended Complaint"). The Amended Complaint alleges Constitutional violations pursuant to 42 U.S.C. § 1983 and various state law claims. Plaintiffs have brought the following claims against Defendant Cupp: 1) Fourth and Fourteenth Amendment violations pursuant to 42 U .S.C. § 1983 for unlawful seizure of the Haldeman Children, conducting an improper interview of Vanessa Haldeman, causing Vanessa to undergo an intrusive medical exam, fabricating evidence, due process violations for lack of a pre-deprivation hearing and seizing the Haldeman Children without probable cause or exigent circumstances, and equal protection violations based on fraudulent and malicious prosecution in the Family Court and in criminal court against Joseph

(Count One); 2) conspiracy to violate civil rights pursuant to 42 U.S.C. § 1983 (Count Two); 3) negligence and gross negligence (Counts Four and Five); 4) Defamation (Count Six); 5) intentional infliction of emotional distress (Count Seven); and 6) invasion of privacy (Count Ten).

On January 30, 2008, Defendant Cupp filed the instant motion for summary judgment (Doc. # 778). Plaintiffs filed their opposition on March 27, 2008, and Cupp filed his reply on April 4, 2008. Defendant Alexander Graves filed a joinder to part of Cupp's motion on January 31, 2008. (Doc. # 789.) Graves's joinder is discussed in a separate order regarding Graves's motion for summary judgment.

STANDARD OF REVIEW

Rule 56 requires summary judgment to be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Porter v. Cal. Dep't of Corrections,* 419 F.3d 885, 891 (9th Cir.2005); *Addisu v. Fred Meyer, Inc.,* 198 F.3d 1130, 1134 (9th Cir.2000). A main purpose of summary judgment is to dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential element at trial. *See id.* at 323. A moving party without the ultimate burden of

persuasion at trial-usually, but not always, the defendant-has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir .2000). The burden initially falls upon the moving party to identify for the court those "portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987) (citing *Celotex Corp.*, 477 U.S. at 323).

Once the moving party has carried its burden under Rule 56, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial" and may not rely on the mere allegations in the pleadings. *Porter*, 419 F.3d at 891 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). In setting forth "specific facts," the nonmoving party may not meet its burden on a summary judgment motion by making general references to evidence without page or line numbers. *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 889 (9th Cir.2003); Local Rule 56.1(f) ("When resolving motions for summary judgment, the court shall have no independent duty to search and consider any part of the court record not otherwise referenced in the separate concise statements of the parties."). "[A]t least some 'significant probative evidence'" must be produced. *T.W. Elec. Serv.*, 809 F.2d at 630 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968)). "A scintilla of evidence or

evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact." *Addisu,* 198 F.3d at 1134.

When "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." *T.W. Elec. Serv.,* 809 F.2d at 631. In other words, evidence and inferences must be construed in the light most favorable to the nonmoving party. *Porter,* 419 F.3d at 891. The court does not make credibility determinations or weigh conflicting evidence at the summary judgment stage. *Id.* However, inferences may be drawn from underlying facts not in dispute, as well as from disputed facts that the judge is required to resolve in favor of the nonmoving party. *T.W. Elec. Serv.,* 809 F.2d at 631.

DISCUSSION

I. State Law Claims, Counts Four, Five, Seven, and Ten

Cupp argues that all of Plaintiffs' allegations used to support their state law claims of negligence, gross negligence, IIED, and invasion of privacy involve his duties as a social worker.[2] Cupp argues that

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[2] In his reply brief, Cupp argues for the first time that the defamation claim should be dismissed because he has a qualified privilege. Pursuant to Local Rule 7.4, "[a]ny arguments raised for the first time in the reply shall be disregarded." However, even if Cupp had properly raised this issue in his motion, rather than in a reply brief, this Court would still be unable to determine as a matter of law whether a qualified privilege applies because neither party has cited to

pursuant to Hawaii Revised Statutes section 350-3, he is entitled to absolute immunity for any state law claims arising out of his duties and responsibilities that he assumed pursuant to Hawaii Revised Statutes Chapter 587.

Hawaii Revised Statute § 350-3 provides that "[a]ny individual who assumes a duty or responsibility pursuant to section 350-2 or chapter 587 shall have immunity from civil liability for acts or omissions performed within the scope of the individual's duty or responsibility." Haw.Rev.Stat. § 350-3(b). Chapter 587 establishes a comprehensive plan for the protection of children who have been abused or neglected, by investigating complaints of abuse, removing children from their parents' custody, placing children in foster care, and initiating further action in the Family Court, when warranted. *See* Haw. Rev. Stat. § 587-21. As recently discussed by the Hawaii Supreme Court, Hawaii Administrative Rule § 17-920.1-1 states that DHS "shall provide protective services immediately to a child who is the subject of a report." *See Kaho'ohanohano v. Dep't of Human Servs. State of Haw.*, 117 Hawai'i 262, 178 P.3d 538, ---- (Haw.2008) (page cites are unavailable). Hawaii Administrative Rule § 17-920.1-11(a) further provides that DHS "shall immediately assess the validity of the report to provide appropriate services to the child and family in accordance with the department's guidelines" and in so doing, DHS must:

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this Court which statements were made specifically by Cupp and under what context.

> (1) Evaluate the report or complaint to insure that it is based on fact;
>
> (2) Take action as soon as possible in order to provide immediate protection to the child;
>
> (3) Discuss the report or complaint directly with the parents, guardians, or custodians preferably through a home visit by: (A) Interpreting [DHS]'s services and legal authority to protect children; (B) Discussing specific reasons for [DHS]'s entry in the particular situation; (C) Evaluating whether the complaint is justified; and
>
> (4) Seeing the child as soon as possible to evaluate the extent to which the child is threatened with harm.

HAR § 17-920.1-11(e).

As stated in this Court's Order Granting in Part and Denying in Part Defendant Forbes' (fka Acero) Motion to Dismiss this case, employment cases regarding respondeat superior liability for an employer where an employee acting within the scope of employment commits a tort are helpful to this analysis.[3] To determine whether a tort was

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[3] This Court is cognizant of the fact that the scope of employment cases and Restatement of Agency approach this issue from the standpoint of liability of the employer, rather than through a lens of qualified immunity for the individual employee's acts. However, this Court finds such cases to be

committed within the scope of an employee's employment under Hawaii law, Hawaii courts follow the Restatement of Agency Section 228, which provides that:

> (1) Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits; [and]
>
> (c) it is actuated, at least in part, by a purpose to serve the master[.] ...
>
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Wong-Leong v. Hawaiian Indep. Refinery, Inc., 76 Hawai'i 433, 879 P.2d 538, 543 (Haw.1994). "In determining the scope of employment, the applicable test is whether the employee's conduct was related to the employment enterprise or if the enterprise derived any benefit from the activity." *Id.* at 546.

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instructive, because the Hawaii Revised Statute at issue clearly states that the scope of employment is the pertinent question, and does not follow the line of cases regarding qualified immunity under 42 U.S.C. § 1983. This Court is also cognizant of the fact that, in this case, the employer, DHS and CPS, have been dismissed because as State agencies, they are absolutely immune from suit pursuant to the Eleventh Amendment.

The Restatement of Agency Section 229 provides that "[t]o be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized." Restatement (Second) of Agency § 229 (1958). The comments provide that

> a servant is authorized to do anything which is reasonably regarded as incidental to the work specifically directed or which is usually done in connection with such work ... [a]lthough an act is a means of accomplishing an authorized result, it may be done in so outrageous or whimsical a manner that it is not within the scope of employment.

Restatement (Second) of Agency § 229 cmts. a and b. Following the Restatement, the Hawaii Supreme Court has noted that an act, "although forbidden, or done in a forbidden manner, may be within the scope of employment ... the ultimate question is whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business [.]" *State v. Hoshijo ex rel. White,* 102 Hawai'i 307, 76 P.3d 550, 563 n. 29 (Haw. 2003) (finding that the actions of a student manager of the state university basketball team in shouting racial slurs at a spectator at a basketball game was conduct within scope of employment because he was required to attend games, work on the bench, assist the team, it was foreseeable that he would interact with the public at

games, and the handbook proscribed use of obscene or inappropriate language to spectators).

Hawaii Revised Statute Section 587-21 provides:

> (a) Upon receiving a report that a child is subject to imminent harm, has been harmed, or is subject to threatened harm, the department shall cause such investigation to be made as it deems to be appropriate. In conducting the investigation the department may:
>
> > (1) Enlist the cooperation of appropriate law enforcement authorities for phases of the investigation for which they are better equipped ...; and
> >
> > (2) Interview a child who is the subject of an investigation without the prior approval of and without the presence of the child's family, including temporarily assuming protective custody of the child for the purpose of conducting the interview, if the action is deemed necessary and appropriate under the circumstances by the department and a police officer.
>
> (b) Upon satisfying itself as to the course of action that should be pursued to best accord with the purpose of this chapter, the department shall: ...

> (3) Assume temporary foster custody of the child pursuant to section 587-24(a) and file a petition with the court under this chapter within three working days ... after the date of the department's assumption of temporary foster custody of the child ...

Applying the law set forth above, this Court found that Duty had qualified immunity for acts or omissions allegedly committed "while investigating the report of possible abuse by speaking with the preschool teachers (or failing to do so), receiving custody of Vanessa from Detective Graves, talking to Vanessa at the preschool and at the Center, interviewing Vanessa, and attending Benjamin's interview[.]" (Duty Order at 28.) This Court so held because these acts were within the scope of her duties, and Plaintiffs had not produced any evidence that "such conduct was intentional or so outrageous as to no longer be considered conduct serving the purposes of the employer" or that it was "outside of the normal risks to be borne by DHS or CPS, or ... outside of the same general nature as that authorized, or incidental to the conduct authorized." (*Id.* at 30, 76 P.3d 550.) This Court also noted that there was no evidence that Duty had a personal motive or intended to conduct a coercive interview. (*Id.*) Thus, this Court found that the Plaintiffs' allegations of "misconduct during the interview of Vanessa by introducing certain concepts, placing the

earpiece in her ear during an unrecorded session, and continuing the interview despite Vanessa's requests to stop, amount to at most negligence." (*Id.*)

Plaintiffs now assert that it was error by this Court to find that Duty's alleged misconduct during the interview of Vanessa amounted to at most negligence because that is a factual finding for the province of the jury and not this Court.[4] Plaintiffs' argument is misplaced. In order to determine whether Duty was entitled to qualified immunity, this Court was charged with determining whether her conduct fell within the scope and duties of her employment. Plaintiffs failed to introduce any evidence which could show that Duty's action of taking an allegedly manipulative interview was above and beyond mere negligence such that it amounted to outrageous intentional conduct not intended to serve her employer, and therefore, outside the scope of Duty's job duties. As such, it was entirely appropriate for this Court to determine that there was no evidence from which one could infer that Duty's interview of Vanessa amounted to more than negligence. *See Celotex Corp.*, 477 U.S. at 323-24 (summary judgment must be granted against a party who fails to demonstrate facts to establish what will be an essential element at trial); *T.W. Elec. Serv., Inc.* ., 809 F.2d at 630 (the non-moving party may not rely on the mere allegations in the pleadings and instead must set forth "specific facts showing that there is a genuine issue for trial").

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[4] Although Plaintiffs believe that this Court erred, they did not file a motion requesting that this Court reconsider the Duty Order.

Here, with respect to Cupp, Plaintiffs have again failed to produce any evidence from which it could be inferred that Cupp acted outside the scope of his duties with respect to seizing Benjamin and observing the interviews of both children, and failing to stop them. Accordingly, as with Duty, Cupp is entitled to qualified immunity for his acts of seizing Benjamin for the limited purpose of conducting an interview, and from failing to stop Duty from continuing to conduct and allegedly manipulative interview of Vanessa.

This Court found, however, that Duty was not entitled to qualified immunity on the state law claims for the following acts because there was a genuine issue of fact as to whether such conduct was beyond mere negligence, such that it was not within the scope of her employment:

> 1) deciding to assume temporary foster custody of both Vanessa and Benjamin, without having interviewed their mother, Denise Haldeman, in apparent contradiction to DHS guidelines; 2) approving claims that Benjamin had corroborated Vanessa's statements of abuse in the Family Court filings, when in fact he had not corroborated inappropriate physical touching, and/or making material omissions in such filings; 3) allegedly conspiring with Cupp to continue making such claims of corroboration; and 4) allowing an intrusive medical exam to be performed on Vanessa without prior consent of at

> least her mother or a court order, or having interviewed her mother.

(Duty Order at 31.)

As with Duty, Cupp is likewise not entitled to qualified immunity for 1) deciding to assume temporary foster custody of both Vanessa and Benjamin, without having interviewed their mother, Denise Haldeman, in apparent contradiction to DHS guidelines; 2) stating that Benjamin had corroborated Vanessa's statements of abuse in the Family Court filings, when in fact he had not corroborated inappropriate physical touching, and/or making material omissions in such filings; 3) allegedly conspiring with Duty to continue making such claims of corroboration; and 4) allowing an intrusive medical exam to be performed on Vanessa without prior consent of at least her mother or a court order, or having interviewed her mother[5]

Cupp has not addressed how conduct of alleged defamation is within his duties. Accordingly, Cupp is not entitled to absolute immunity under Hawaii Revised Statute Section 350-3 for the defamation claim.

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[5] Cupp states that he had no role in the decision to order the medical exam. However, based on Duty's understanding of the DHS guidelines, it appears that she and Cupp had authority to order such exam, but should have first interviewed at least Denise Haldeman before doing so. Thus, there is a question of fact of whether Cupp and Duty had authority to overrule Graves's decision, or whether their approval was necessary for the exam.

II. Section 1983 Claims, Counts One and Two

A. Absolute Immunity

1. Filing the Family Court Petition and Report

Defendant Cupp argues that he is entitled to absolute immunity as to Plaintiffs' Section 1983 claims arising from his role in filing the Petition for Temporary Custody and other documents in Family Court because he was playing a critical role in the judicial process.

"[T]he scope of absolute immunity for social workers is extremely narrow." *Miller v. Gammie,* 335 F.3d 889, 898 (9th Cir.2003). The Ninth Circuit has held that "social workers are entitled to absolute immunity in performing quasi-prosecutorial functions connected with the initiation and pursuit of child dependency proceedings," to take custody away from parents. *Meyers v. Contra Costa County Dept. of Social Servs.,* 812 F.2d 1154, 1157 (9th Cir.1987). This is because, like a prosecutor,

> [t]he social worker must make a quick decision based on perhaps incomplete information as to whether to commence investigations and initiate proceedings against parents who may have abused their children. The social worker's independence, like that of a prosecutor, would be compromised were the social worker constantly in fear that a mistake could result in a time-consuming and financially devastating civil suit.

Id. In *Miller,* the court stated that

> it would appear that the critical decision to institute proceedings to make a child a ward of the state is functionally similar to the prosecutorial institution of a criminal proceeding. The decision, therefore, is likely entitled to absolute immunity. It also may be that some submissions to the court by social workers are functionally similar to the conduct recognized at common law to be protected by absolute prosecutorial immunity.

335 F.3d at 898 (citation omitted). The Ninth Circuit has recently definitively held, however, that although social workers have absolute immunity when they make decisions to institute dependency proceedings "they are not entitled to absolute immunity from claims that they fabricated evidence during an investigation or made false statements in a dependency petition affidavit that they signed under penalty of perjury, because such actions aren't similar to discretionary decisions about whether to prosecute." *Beltran v. Santa Clara,* 514 F.3d 906, 908 (9th Cir.2008). The party asserting entitlement to absolute immunity bears the burden of establishing the justification for such immunity. *Antoine v. Byers & Anderson, Inc.*, 408 U.S. 429, 433 (1993).

Duty made this same argument in her motion and based upon the *Beltran* case, this Court found that Duty was not entitled to absolute immunity for filing the petition in Family Court because such filing included statements that could be found to be knowingly false or misleading. (Duty Order at 36.)

Likewise, as Plaintiffs have demonstrated that the petition filed by Cupp in Family Court, at a minimum, gave the false impression that Benjamin had corroborated the important allegations of physical sexual abuse of Vanessa by her father and that the mother was aware of it and failed to protect Vanessa, Cupp is not entitled to qualified immunity for filing the Family Court petition and other such documents in the Family Court. Therefore, Cupp's motion for summary judgment on this issue is DENIED.

2. In-Court Testimony

Cupp argues that to the extent Counts 1 and 2 are based on providing in-court testimony or a conspiracy to harmonize in-court testimony and/or conspiracy to present perjured testimony at trial, he is absolutely immune from suit for such alleged conduct. Plaintiffs state that they are not suing Cupp for his in-court testimony.

As this Court held in the Order Granting in Part and Denying in Part Defendant Forbes' (fka Accro) Motion to Dismiss, a witness not only has absolute immunity from liability for civil damages under Section 1983 for giving perjured testimony at trial, but also has "absolute immunity for conspiring to present her own and another witness's perjured testimony at trial." *Franklin v. Terr,* 201 F.3d 1098, 1099 (9th Cir.2000) (citing *Briscoe v. LaHue,* 460 U.S. 325, 326, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983)). This is because allowing a claim for conspiracy to present false testimony would "undermine the purposes served by granting witnesses absolute

immunity from damages liability under § 1983." *Id.* at 1101.

Accordingly, Defendant Cupp is immune from suit to the extent Counts 1 and 2 are based upon conspiring to present false testimony and his motion on this issue is GRANTED. As found in the Duty Order, however, this does not apply to the allegations that Cupp conspired with Duty to present fabricated evidence to the Family Court. *See Cunningham v. Gates,* 229 F.3d 1271, 1291 (9th Cir.2000) ("[o]bviously, testimonial immunity does not encompass non-testimonial acts such as fabricating evidence.")

B. Qualified Immunity

Cupp argues that he is entitled to qualified immunity for claims arising out of his investigation, the medical exam of Vanessa, and alleged fabrication of evidence, because there is no constitutional right to a perfectly drafted petition for custody, his conduct was reasonable, and the Family Court filings did not contain fabricated evidence, and at most contained inaccuracies.

In the Duty Order, this Court noted that there is a well established liberty interest of parents in the custody of their children. *See Campbell v. Burt,* 949 F.Supp. 1461, 1466 (D.Haw.1996); *see also Rogers v. County of San Joaquin,* 487 F.3d 1288, 1294 (9th Cir.2007) ("[p]arents and children have a well-elaborated constitutional right to live together without governmental interference. The Fourteenth Amendment guarantees that parents will not be separated from their children without due process of

law except in emergencies.") (citations and internal quotation marks omitted). Thus, Cupp's argument that there is no Constitutional right to a perfectly prepared Family Court petition is irrelevant because there is a clearly established Constitutional right for families to live together, which may be violated where children are separated without due process and no emergency existed.

This Court also noted in the Duty Order that the Ninth Circuit held that State officials violate the right to custody of the children

> if they remove a child from the home absent information at the time of the seizure that establishes reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury. The Fourth Amendment also protects children from removal from their homes absent such a showing.

Rogers, 487 F.3d at 1294.

Applying those principles, this Court found that Duty was entitled to qualified immunity as a matter of law with respect to the initial seizure of both children from the schools for the limited purpose of conducting forensic interviews. This Court so held because there was no genuine issue of fact that based upon the seriousness of Vanessa's allegations and the ages of the young children, Duty had reasonable cause to believe that Vanessa and Benjamin were in

imminent danger of serious bodily injury, and that the scope of the intrusion, an interview of each child, was reasonably necessary to avert any further possible sexual molestation. Therefore, this Court found that Duty reasonably believed that a limited seizure of both children was lawful.

Plaintiffs, without having filed a motion for reconsideration on this issue, again assert that the above finding was in error because it is a question for the jury. Plaintiffs' argument is meritless because it is clearly within this Court's authority to determine whether a qualified immunity defense applies. *See Hemphill v. Kincheloe,* 987 F.2d 589, 592-93 (9th Cir.1993) ("[i]f a reasonable official could have believed that his actions were lawful, summary judgment on the basis of qualified immunity is appropriate.") (citations omitted); *see also Act Up!/Portland v. Bagley,* 988 F.2d 868, 873 (9th Cir.1993) ("The determination of whether the facts alleged could support a reasonable belief in the existence of probable cause or reasonable suspicion is also a question of law to be determined by the court") (citations omitted). Accordingly, like Duty, Cupp is also entitled to qualified immunity for the initial seizure of Benjamin for the purpose of conducting an interview.

However, this Court found that genuine issues of fact existed as to whether Duty should have qualified immunity for actions of continuing the seizure of both children after completing the interviews, and allowing a medical exam of Vanessa to be conducted without a court order, and whether it was reasonable to believe that both Benjamin and Vanessa would

likely experience serious bodily harm in the time that would be required to obtain a warrant. Accordingly, these genuine issues of fact exist as to Cupp's conduct as well.

Specifically, although Cupp asserts that he was not involved with ordering the medical examination of Vanessa and that it was Graves who ordered the exam, Plaintiffs have produced evidence that Cupp had authority to order such exam. Cupp has not denied that he was aware that such exam was ordered without a court order or parental consent and that he did not object to the exam going forward. Neither has Cupp explained why a court order could not have been obtained prior to conducting the medical exam.

Cupp next argues that he is entitled to qualified immunity for statements made in the Family Court filings because those statements were mere inaccuracies, not fabricated evidence.

As set forth in the Duty Order, "there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." *Devereaux v. Abbey,* 263 F.3d 1070, 1074-75 (9th Cir.2001). Likewise, making false statements in a dependency petition with the intent that the court rely on it, causing the parents to temporarily lose custody, seriously infringes on a parent's constitutional rights. *See Beltran,* 514 F.3d 906, 2008 WL 193319, at *1 (no absolute immunity where a social worker "fabricated evidence during an investigation or made false statements in a dependency petition affidavit."). Where the false

evidence comes only from one interview of a child, the plaintiff must,

> at a minimum, point to evidence that supports at least one of the following two propositions: (1) Defendants continued their investigation of [the alleged perpetrator] despite the fact that they knew or should have known that he was innocent; or (2) Defendants used investigative techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false information.

Devereaux, 263 F.3d at 1076.

Here, although some of the language that Plaintiffs take issue with in the Family Court filings appear to be minor inaccuracies, there do exist omissions of information and misstatements of fact in those filings which are sufficient to create a genuine issue of fact of either whether Cupp continued to pursue foster custody despite the fact that he should have known that Joseph and Denise Haldeman were innocent, or whether Cupp should have known that Duty's interview techniques were so coercive that they yielded false information. Accordingly, Plaintiffs have provided enough evidence to survive summary judgment on this issue. It is for the jury to decide if those omissions and misstatements are in fact fabrication of evidence. Accordingly, Cupp is not entitled to qualified immunity as a matter of law with respect to the claim for fabrication of evidence.

Cupp also argues that Plaintiffs' evidence does not rise to the level of a violation of Constitutional rights because they cannot show that the inclusion of inaccuracies in the Family Court filings rise to the level of deliberate indifference. Cupp argues that the inaccuracies are not conscience shocking, especially in light of the fact that he had to prepare the petition within three working days, without the luxury of a written transcript. This argument fails. Plaintiffs have produced enough evidence to create a question of fact of whether the statements made by Cupp in the Family Court filings were made with deliberate indifference. Although Cupp did not have a transcript, he had observed both interviews and they were videotaped.

For these reasons, Cupp's Motion is GRANTED IN PART AND DENIED IN PART on this issue.

C. Conspiracy Claim

Cupp argues that Plaintiffs' civil conspiracy claim fails as a matter of law because Plaintiffs have not presented enough evidence from which it can be inferred that there was a meeting of the minds between him and Duty to violate Plaintiffs' Constitutional rights. This Court disagrees.

> A civil conspiracy is a combination of two or more persons who, by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another which results in damage. To be liable, each participant in the conspiracy need not know the exact details of the plan, but each

> participant must at least share the common objective of the conspiracy. A defendant's knowledge of and participation in a conspiracy may be inferred from circumstantial evidence and from evidence of the defendant's actions.

Gilbrook v. City of Westminster, 177 F.3d 839, 856-57 (9th Cir. 1999) (citations omitted).

As found in the Duty Order, there is enough evidence to survive summary judgment on the question of whether Duty and Cupp conspired to produce fabricated evidence in Family Court filings and proceedings. A jury could infer from each of the Defendants' participation in the events giving rise to this case that Duty and Cupp reached a "unity of purpose or a common design" to present falsified evidence in the Family Court in order to support their decisions to allow a medical exam of Vanessa, and to continue to seize the Haldeman Children and place them in a foster home, without having first obtained a warrant from a court, and/or interviewed Denise Haldeman. *Id.* ("Acts which seem otherwise innocent, when viewed in the context of the surrounding circumstances, may justify an inference of complicity.") (citation omitted). Thus, Cupp's motion on this issue is DENIED.

D. Punitive Damages

Cupp asserts that he cannot be held liable for punitive damages pursuant to Hawaii Revised

Statute section 662-2, and because there is no evidence that he acted with malice.

Hawaii Revised Statute section 662-2 provides that "[t]he State hereby waives its immunity for liability for the torts of its employees and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages ." Cupp's argument regarding section 662-2 is meritless as that statue, by its terms, applies to liability of the State, not of an individual. Although Cupp was a State employee, Cupp is being sued in his individual capacity.

Punitive damages may be awarded in a § 1983 case against an individual defendant "if the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade,* 461 U.S. 30, 56, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983).

Plaintiffs have presented enough facts to create a genuine issue of whether Cupp acted in reckless disregard to Plaintiffs' Constitutional rights. Indeed, Cupp continued to allege that Benjamin corroborated Vanessa's statements of physical sexual abuse long after the transcripts of the interviews were made available and long after allegations were made that Benjamin did not corroborate such statements. Accordingly, Cupp's motion for summary judgment on this issue is DENIED.

CONCLUSION

For the reasons stated above, this Court GRANTS IN PART AND DENIES IN PART Defendant Cupp's Motion for Summary Judgment. Cupp is entitled to immunity on the state law tort claims for only some of his conduct. Likewise, Cupp is entitled to qualified immunity on the federal claims brought pursuant to 42 U.S.C. § 1983 as to only some of his conduct. With respect to the conspiracy claim, Plaintiffs have presented enough facts to survive summary judgment based on an alleged conspiracy between Duty and Cupp to present fabricated evidence to Family Court.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, April 15, 2008

/s/ David Alan Ezra, United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Jan. 20, 2010]

VANESSA HALDEMAN; et al., Plaintiffs-Appellees, v. RUTH GOLDEN, in her individual capacity; et al., Defendants, and KAREN DUTY, in her individual capacity, Defendant-Appellant.	No. 08-15648 D.C. No. 05-CV-00810-DAE-KSC ORDER
VANESSA HALDEMAN; et al., Plaintiffs-Appellees, v. RUTH GOLDEN, in her individual capacity; et al., Defendants, and DONALD CUPP, in his individual capacity, Defendant-Appellant.	No. 08-16352 D.C. No. 05-CV-00810-DAE-KSC

Before BEEZER, GRABER and FISHER, Circuit Judges.

Plaintiffs-Appellees' motion for acceptance of late filing of petition for panel rehearing and rehearing en banc is GRANTED.

The panel has voted to deny the petition for panel rehearing. Judges Graber and Fisher vote to deny the petition for rehearing en banc and Judge Beezer so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.